

CHAPTER 11

CORRUPTION AND PUBLIC PROCUREMENT

[This chapter was first prepared in part by Mollie Deyong as a directed research and writing paper on corruption in Canada's MASH sector under Professor Ferguson's supervision. Professor Ferguson then expanded the chapter with the research and writing assistance of Erin Halma. Connor Bildfell made extensive revisions in 2017.]

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1. INTRODUCTION

Transparency International (TI) defines public procurement as “the acquisition by a government department or any government-owned institution of goods or services.”¹ Although large-scale items and projects, such as armaments or infrastructure buildings, are the most obvious examples of public procurement, the term also refers to the acquisition of supplies and services including school supplies (such as textbooks), hospital supplies (such as bed sheets) and financial or legal services.²

This chapter introduces the vast topic of corruption in public procurement.³ After setting out the contextual backdrop—including the negative effects and prevalence of corruption in public procurement—the chapter will explore how public procurement works and which industries suffer from the highest levels of procurement corruption, along with the key elements of effective procurement systems. It will conclude with a discussion on international legal instruments and standards for regulating procurement, as well as private and public law governing the public procurement process in the US, UK and Canada.

¹ Susanne Kühn & Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (Transparency International, 2014) at 4, online: <www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>.

² *Ibid.*

³ As referenced by Graham Steele at footnote 124 of his LLM thesis, *Quebec’s Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (Dalhousie University Schulich School of Law, 2015), online: <dalspace.library.dal.ca/handle/10222/56272>, the most recent version of the *Bibliography on Public Procurement Law and Regulation* (Public Procurement Research Group, University of Nottingham, online: <<https://www.nottingham.ac.uk/pprg/documentsarchive/bibliography-at-nov-2012.pdf>>) amounts to 343 pages.

For convenience, many examples of corruption and methods for reducing corruption tend to be drawn from the most prevalent area of public procurement corruption: the construction industry. This should not be taken as an indication that procurement corruption and its prevention are identical in all public procurement sectors. For example, military defence procurement is typically governed by a process separate from the general government procurement regime.⁴ The absence of a full discussion of other sectors and procurement regimes is primarily a product of the limited space that can be dedicated to the subject of procurement corruption in this book.

1.1 Adverse Consequences of Corruption in Public Procurement

The World Bank makes a distinction between two broad categories of corruption:

- (1) **state capture**, which refers to actions by individuals, groups, or organizations to influence public policy formation by illegally transferring private benefits to public officials (i.e., efforts by private actors to shape the institutional environment in which they operate); and
- (2) **administrative corruption**, which refers to the use of the same type of corruption and bribes by the same actors to interfere with the proper implementation of laws, rules, and regulations.⁵

Examples of public procurement corruption can be found in either category. Corruption in the nature of “state capture,” for example, may involve attempts by private firms to influence the broader project appraisal, design, and budgeting process by making illicit campaign contributions. “Administrative corruption” could include, for example, a bidder’s attempt to bribe an administrative decision maker in order to secure a lucrative public procurement contract. A further example would be the giving of a bribe by a contractor to a government engineer or inspector to “ease up” on his or her inspection of substandard goods or services provided by the contractor. Although such actions may be seen by the parties involved as relatively harmless, the reality is that the effects of corruption in public procurement, no matter how “small” the act, can be devastating.

⁴ Martin Auger, *Defence Procurement Organizations: A Global Comparison* (Library of Parliament, 2014), online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2014-82-e.html>>.

⁵ Elizabeth Anderson, “Municipal ‘Best Practices’: Preventing Fraud, Bribery and Corruption” (Vancouver, BC: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013) at 2, online: <icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Municipal_Best_Practices_-_Preventing_Fraud,_Bribery_and_Corruption_FINAL.pdf>. See also Joel S Hellman, Geraint Jones & Daniel Kaufmann, “Seize the State, Seize the Day: An Empirical Analysis of State Capture and Corruption in Transition” (Paper prepared for the ABCDE 2000 Conference, Washington, DC, 18–20 April 2000), online: <siteresources.worldbank.org/INTABCDEWASHINGTON2000/Resources/hellman.pdf>.

Corruption in public procurement can have many detrimental effects. For instance, corruption often increases the cost and lowers the quality of goods or services acquired while reducing the likelihood that the goods or services purchased will meet the public's needs.⁶ The OECD estimates that corruption drains off between 20 and 25% of national procurement budgets.⁷ Furthermore, corruption in public procurement may adversely shape a country's economy as corrupt officials allocate budgets based on the bribes they can solicit rather than the needs of the country.⁸ This often results in the approval of large-scale infrastructure projects because these projects provide many opportunities for corruption through frequent delays and the various levels of government approvals required. When public infrastructure projects are tainted by corruption, project owners, funders, employees, construction firms and suppliers, government officials, and the public suffer.⁹

Corruption in public procurement can be profoundly harmful to a country's economy. The Padma Bridge corruption scandal in Bangladesh led the World Bank to cancel a US\$1.2 billion loan to build the bridge. Even if the government of Bangladesh is able to secure other financing for the project in the future, the delay to this project has caused significant physical and economic harms. The proposed bridge project is crucial to increasing economic activity in Bangladesh.¹⁰ The bridge was intended to facilitate the transportation of goods and passengers in a timely and cost-effective manner. Currently, in the absence of the bridge, transport across the Padma River requires an inefficient and dangerous trip by boat or barge.

Corruption in public procurement can also be detrimental to the environment. In the Philippines, a contract for a US\$2 billion nuclear power plant was controversially awarded to Westinghouse, who later admitted to having paid US\$17 million in commissions to a

⁶ Kühn & Sherman (2014) at 4, online:

<www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>

Kühn and Sherman provide a number of examples of the detrimental effects of corruption in public procurement. According to estimates by Transparency International, corruption can add as much as 50% to a project's costs: Transparency International, "Public Procurement", online:

<www.transparency.org/topic/detail/public_procurement>.

⁷ OECD, *Implementing the OECD Principles for Integrity in Public Procurement: Progress Since 2008* (2013), online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>.

⁸ Paul Collier & Anke Hoeffler, "The Economic Costs of Corruption in Infrastructure" in Diana Rodriguez, Gerard Waite & Toby Wolfe, eds, *Global Corruption Report 2005* (Pluto Press in association with Transparency International, 2005) 12 at 13, online: <www.transparency.org/whatwedo/publication/global_corruption_report_2005_corruption_in_construction_and_post_conflict>.

⁹ *Ibid* at 6. For an example of the complex web of different parties that can be involved in procurement projects, see Global Infrastructure Anti-Corruption Centre, "Why Corruption Occurs" (1 May 2008), online: <www.giacentre.org/why_corruption_occurs.php>.

¹⁰ World Bank, Press Release, "World Bank to Finalize Padma Bridge Financing" (19 December 2010), online: <<http://www.worldbank.org/en/news/press-release/2010/12/19/world-bank-to-finalize-padma-bridge-financing>>.

friend of Ferdinand Marcos, the Filipino dictator.¹¹ The contract was initially denied, but Marcos reversed the decision. Westinghouse claimed these commissions were not a bribe. The nuclear reactor sits on a fault line, and if an earthquake occurs while the nuclear reactor is operational, there is a major risk of nuclear contamination. The power plant has not been operational or produced any electricity since its completion in the 1980s. This project was a massive misuse of public funds and would be a health and environmental nightmare if operational.

Corruption in public procurement is suspected of increasing deaths and injuries in earthquakes. In the past 15 years, there have been approximately 156,000 earthquake-related deaths and 584,000 injuries.¹² Many of these deaths and injuries were the result of building collapses caused by substandard building practices.¹³ In southern Italy, a maternity wing of a six-story hospital collapsed and almost no occupants survived.¹⁴ Investigation into the incident found that although the planning for the hospital was designed to code and included adequate materials to prevent the collapse, the building had not been built to code.¹⁵ The builders' disregard for building regulations and the inspectors' failure to properly control and inspect the building resulted in a preventable catastrophe and many preventable deaths.

Finally, corruption in public procurement can lead to an erosion of public confidence in government institutions. As Managing Director of TI, Cobus de Swardt writes:

When the products that citizens ultimately pay for are dangerous, inappropriate or costly there will be an inevitable loss of public confidence and trust in governments. Corrupted bidding processes also make a mockery of the level playing field for businesses, especially for younger, innovative companies eager to compete in a fair manner who may not have the backdoor contacts to buy contracts.¹⁶

Thus, public procurement corruption results not only in immediate, tangible losses to the public, but also in a deeper erosion of public trust in the government. The effect may be to drive away good companies who are unwilling to buy their way into procurement contracts,

¹¹ Peter Bosshard, "The Environment at Risk from Monuments of Corruption" in Rodriguez, Waite & Wolfe, eds, (2005) 19 at 20.

¹² James Lewis, "Earthquake Destruction: Corruption on the Fault Line" in Rodriguez, Waite & Wolfe, eds, (2005) 23 at 23.

¹³ *Ibid.*

¹⁴ David Alexander, "The Italian Mafia's Legacy of High-Rise Death Traps" in Rodriguez, Waite & Wolfe, eds, (2005) 26 at 26.

¹⁵ *Ibid.*

¹⁶ Cobus de Swardt, "Transparency in Public Procurement: Moving Away from the Abstract", Transparency International (27 March 2015), online: <oecdinsights.org/2015/03/27/transparency-in-public-procurement-moving-away-from-the-abstract/>.

leaving behind a pool of unscrupulous and inexperienced contractors to carry out the projects.

The broader implications of a loss of confidence in the State and its institutions are severe. Professor Larry Diamond observes:

In the absence of trust, citizens become cynical about their political system and disaffected with the existing order. Distrust may produce alienation and withdrawal from the political process, leaving behind a shallow, fragile state that cannot mobilize national resources or shape a collective vision for national development. If it festers for very long, widespread and intense distrust may eventually generate a backlash against the political order and a search for more radical, anti-system alternatives. Failed states, revolutions, civil wars, and other related traumatic failures of governance all share in common the absence or collapse of trust.¹⁷

1.2 How Much Money Is Spent on Public Procurement?

Annually, governments worldwide spend approximately US\$9.5 trillion on public procurement projects, which represents 10 to 20% of GDP and up to 50% or more of total government spending.¹⁸ The OECD estimates that corruption costs account for around US\$2 trillion of this annual procurement budget.¹⁹ Broadly speaking, this distorts competition, compromises the quality of public projects and purchases, wastes taxpayer dollars and contributes to endemic corruption, thus eroding trust in government.²⁰ Some procurement projects—such as the construction of facilities for major sporting events like the Olympics or the construction of airports—are so large in relation to local economies that cost overruns

¹⁷ Larry Diamond, “Building Trust in Government by Improving Governance” (Paper presented to the 7th Global Forum on Reinventing Government, Vienna, 27 June 2007), online: <<https://stanford.edu/~ldiamond/paperssd/BuildingTrustinGovernmentUNGLobalForum.pdf>>.

¹⁸ Kühn & Sherman (2014) at 4, online: <www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>. Canadian federal departments and agencies alone spend about CAD\$18 billion annually: Office of the Procurement Ombudsman, *Annual Report 2015–16* at 7, online: <opo-boa.gc.ca/documents/rapports-reports/2015-2016/annuel-annual-2015-2016-eng.pdf>.

¹⁹ *Ibid.*

²⁰ *Ibid.* Like all forms of corruption, corruption in public procurement is extremely difficult to quantify. Even where corrupt activities are identified, it can be very difficult to trace and calculate the chain of losses that flow from incidences of corruption. It is often practically impossible to calculate the quantum of loss. See e.g., Global Infrastructure Anti-Corruption Centre, “Section 1: Understanding the Cost of Corruption in Relation to Infrastructure Projects”, online: <www.giacentre.org/cost_of_corruption.php>.

may distort an entire country or region's economy.²¹ To the extent that such cost overruns are due to corruption, corruption contributes to the destabilization of local economies.

1.3 Public Procurement Corruption within Developed Countries

Corruption in public procurement is not only a concern for the developing world, but also exists in developed countries. Therefore, adequate controls are needed in all countries. The US spends approximately US\$530 billion a year on procurement, and although it has extensive laws and regulations in place, its system is not free from corruption.²² For example, in the US in 2013, a former manager of the Army Corps of Engineers was found guilty of accepting bribes from construction contractors for certifying bogus and inflated invoices.²³ Italy provides another example:

Italian economists found that the cost of several major public construction projects fell dramatically after the anti-corruption investigations in the early nineties. The construction cost of the Milan subway fell from \$227 million per kilometre in 1991 to \$97 million in 1995. The cost of a rail link fell from \$54 million per kilometre to \$26 million, and a new airport terminal is estimated to cost \$1.3 billion instead of \$3.2 billion.²⁴

A further example of public procurement corruption within developed countries is provided by the findings of the Charbonneau Commission. The Charbonneau Commission, known officially as the *Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, was a major public inquiry into corruption in public contracting in Quebec.²⁵ Justice France Charbonneau chaired the commission launched on October 19, 2011 by Premier Jean Charest. The Commission had a three-fold mandate:

²¹ Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Susan Rose-Ackerman & Tina Søreide, eds, *International Handbook on the Economics of Corruption*, vol 2 (Edward Elgar, 2011) at 87.

²² Daniel I Gordon, "Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules and Aspects of the System That Help Reduce Corruption" in Jean-Bernard Auby, Emmanuel Breen & Thomas Perroud, eds, *Corruption and Conflicts of Interest: A Comparative Law Approach* (Edward Elgar, 2014) 39 at 39.

²³ "19-Year Corruption Sentence for Ex-Manager with Army Corps of Engineers", *The New York Times* (12 July 2013), online: <www.nytimes.com/2013/07/12/us/19-year-corruption-sentence-for-ex-manager-with-army-corps-of-engineers.html?_r=0>.

²⁴ Tina Søreide, "Corruption in Public Procurement: Causes, Consequences, and Cures" (Chr Michelson Institute, 2002) at 1, online: <<https://www.cmi.no/publications/file/843-corruption-in-public-procurement-causes.pdf>>.

²⁵ For a concise summary of the Charbonneau Commission's activities and findings, see "Charbonneau Commission Finds Corruption Widespread in Quebec's Construction Sector", *CBC News* (24 November 2015), online: <www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577>.

- 1) Examine the existence of schemes and, where appropriate, paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the construction industry (including private organizations, government enterprises, and municipalities) and include any links with the financing of political parties.
- 2) Investigate possible infiltration of organized crime in the construction industry.
- 3) Consider possible solutions and make recommendations establishing measures to identify, reduce, and prevent collusion and corruption in awarding and managing public contracts in the construction industry.²⁶

In her final report, Justice Charbonneau concluded that corruption and collusion in the awarding of government contracts in Quebec was far more widespread than originally believed.²⁷ Influence peddling was found to be a serious issue in Quebec's construction sector and organized crime had infiltrated the industry. As Justice Charbonneau writes in the preamble to the full report, "[t]his inquiry confirmed that there is a real problem in Quebec, one that was more extensive and ingrained than we could have thought."²⁸

While Quebec has faced significant corruption issues, journalist McKenna suggests that it is not the only Canadian province affected by ongoing corruption scandals involving the Montreal construction sector and Montreal-based SNC-Lavalin.²⁹ He provides three reasons for this assertion: (1) federal tax money is wasted, (2) the negative reputation of a Canadian company engaging in international business affects all Canadian companies, and (3) corruption spreads and is not necessarily stopped by provincial borders.³⁰ He claims, "[i]t defies logic that corruption would be a way of life in one province and virtually absent in the rest of the country."³¹

These examples demonstrate that all countries, whether developed or developing, need effective procedures and laws in place to reduce the opportunity for corruption in public procurement.

²⁶ Gouvernement du Québec, "Mandat" (9 November 2011), online: <www.ceic.gouv.qc.ca/la-commission/mandat.html>.

²⁷ France Charbonneau, "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dan l'industrie de la construction" (November 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>.

²⁸ Martin Patriquin, "No One Can Deny It Now: Quebec Is Facing a Corruption Crisis", *Macleans's* (24 November 2015), online: <www.macleans.ca/news/canada/quebecs-now-undeniable-corruption-crisis/>.

²⁹ Martin Patriquin, "carbonneauQuebec: The Most Corrupt Province", *Macleans's* (24 September 2010), online: <www.macleans.ca/news/canada/the-most-corrupt-province/>.

³⁰ Barrie McKenna, "Quebec's Corruption Scandal Is a Canadian Problem", *The Globe and Mail* (10 December 2012), online: <www.theglobeandmail.com/report-on-business/quebecs-corruption-scandal-is-a-canadian-problem/article6140631/>.

³¹ *Ibid.*

1.4 The Importance of Maintaining a Low-Risk Environment

Anti-corruption scholars and practitioners agree that increased opportunities for corruption have a positive relationship with actual incidences of corruption. It is therefore crucial to maintain a low-risk environment. The lack of accountability enabled by a loose regulatory framework produces opportunities for corruption. The World Bank explains the connection between accountability and decreased corruption risk as follows:

Accountability ... is the degree to which local governments have to explain or justify what they have done or failed to do.... Accountability can be seen as the validation of participation, in that the test of whether attempts to increase participation prove successful is the extent to which [the public] can use participation to hold a local government responsible for its actions In theory, ... more transparency in local governance should mean less scope for corruption, in that dishonest behavior would become more easily detectable, punished and discouraged in the future.³²

2. RISKS AND STAGES OF CORRUPTION IN PUBLIC PROCUREMENT

2.1 Risk of Corruption by Industry and Sector

Transparency International's Bribe Payer's Index (2011) ranked 19 industries for prevalence of foreign bribery. The public works and construction sector scored lowest, making it the industry sector most vulnerable to bribery.³³ The list below ranks the industries and business sectors from highest prevalence of foreign bribery to lowest prevalence of foreign bribery:

1. Public works contracts and construction
2. Utilities
3. Real estate, property, legal and business services
4. Oil and gas
5. Mining
6. Power generation and transmission
7. Pharmaceutical and healthcare

³² Decentralization Thematic Team, "Accountability, Transparency and Corruption in Decentralized Governance", World Bank, online:

<<https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html>>.

³³ Transparency International, *Bribe Payers Index 2011* at 15, online:

<www.transparency.org/bpi2011/results>. The 2011 Bribe Payers Index is Transparency International's most recent Bribery Index.

8. Heavy manufacturing
9. Fisheries
10. Arms, defence, and military
11. Transportation and storage
12. Telecommunications
13. Consumer services
14. Forestry
15. Banking and finance
16. Information technology
17. Civilian aerospace
18. Light manufacturing
19. Agriculture

TI suggests that the construction industry is particularly vulnerable to bribery because of the large size and fragmented nature of construction projects, which often involve multiple contractors and sub-contractors.³⁴ The large and complex nature of many construction projects makes it difficult to monitor payments and implement effective policies and standards. Since major public infrastructure projects are often “special purpose, one-of-a-kind deals” that are massive in scale, produce high levels of economic rents, present difficulties in establishing benchmarks for cost and quality and can be challenging to monitor, corruption risks abound.³⁵ Construction projects also involve many instances in which private actors require government approval, resulting in opportunities for the offering or demanding of bribes. The prevalence of bribery in the procurement industry is illustrated by the OECD’s finding: 57% of the 427 foreign bribery cases prosecuted under the OECD Anti-Bribery Convention between 1999 and 2014 involved bribes to obtain public procurement contracts.³⁶

2.2 Stages and Opportunities for Procurement Corruption

Corruption in public procurement can take many forms and can occur at any time throughout the lengthy procurement process. Most corruption experts agree that the following factors magnify opportunities for corruption: (1) monopoly of power, (2) wide discretion, (3) weak accountability and (4) lack of transparency.³⁷ Government agencies in developing countries tend to display these characteristics, creating more opportunities for corruption in procurement in those countries. Procurement in developing countries can

³⁴ Kühn & Sherman (2014) at 20.

³⁵ Susan Rose-Ackerman & Rory Truex, “Corruption and Policy Reform” (2012) Yale Law & Economics Research Paper 444 at 24, online: <papers.ssrn.com/sol3/Papers.cfm?abstract_id=2007152>.

³⁶ OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (2014) at 8, online: <<http://dx.doi.org/10.1787/9789264226616-en>>.

³⁷ Glenn T Ware et al (2011) 65 at 67.

comprise up to 20% of the country's GDP, and the high proportion of the economy occupied by public procurement makes it difficult for companies to find contracts outside the public sphere. This motivates companies to resort to corruption when competing for contracts in developing countries,³⁸ while public officials are often motivated by low wages.³⁹ Meanwhile, the broad discretion afforded to officials in making procurement decisions and the lack of capacity to monitor and punish corruption exacerbates opportunities for corruption.

Wells wrote a helpful article for the U4 Anti-Corruption Resource Centre entitled "Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation."⁴⁰ This article explores how corruption opportunities arise, especially in the project selection and project preparation stages of the procurement process for public infrastructure projects. Since public infrastructure projects carry the highest risk for procurement corruption and consume "roughly one half of all fixed capital investment by governments,"⁴¹ the public infrastructure sector is a worthy area for more detailed analysis. According to Wells, estimates of bribery payments in public infrastructure construction "vary globally from 5% to 20% [of construction costs] or even higher."⁴² However, focusing solely on bribe payments distorts the overall size and impact of corruption. Wells cites the work of Kenny, who engages in a broader impact analysis and suggests that the most harmful forms of corruption for development outcomes are:

- (1) Corruption that influences the project appraisal, design, and budgeting process by diverting investment towards projects with low returns and towards new construction at the expense of maintenance and (2) corruption during project implementation that results in substandard construction that shortens the life of projects and hence drastically reduces the economic rate of return (ERR).⁴³

Procurement scholars and practitioners agree that public investment in infrastructure projects requires an effective public investment management system (PIM System). Absence of such a system, or a weak management system, is a sure means of promoting high levels

³⁸ *Ibid* at 66.

³⁹ Marie Chêne, "Low Salaries, the Culture of Per Diems and Corruption", U4 Expert Answer (23 November 2009), online: <www.u4.no/publications/low-salaries-the-culture-of-per-diems-and-corruption/>.

⁴⁰ Jill Wells, "Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation", U4 (March 2015, Issue No 8), online: <www.u4.no/publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation/>.

⁴¹ *Ibid* at 1.

⁴² *Ibid*.

⁴³ *Ibid*.

of corruption.⁴⁴ Wells notes that management systems should include an analysis of whether the proposed project is a strategic priority, whether there are alternatives, whether the proposed project is likely to be economically feasible, and whether the project is likely to survive environmental and social impact assessments. Before an infrastructure project is chosen, it should be subject to an independent, professional appraisal to ensure that improper, irrelevant or corrupt influences were not driving the project proposal. Once a project is selected, a detailed design and budget must be prepared in a manner that ensures against, or at least minimizes the risk of, corruption influencing the design and budget phases. The other stages of the procurement process involve tenders for the project, implementation of the project, supervision of the project’s implementation, and a final audit upon completion.

Wells provides an overview of corruption risks at various stages of the public procurement process for infrastructure projects:

Table 11.1 Overview of Corruption Risks during Public Procurement Process for Infrastructure Projects⁴⁵

Stages	Risks	Main actors
Project appraisal	<ul style="list-style-type: none"> • Political influence or lobbying by private firms that biases selection to suit political or private interests • Promotion of projects in return for party funds • Political influence to favour large projects and new construction over maintenance • Underestimated costs and overestimated benefits to get projects approved without adequate economic justification 	<ul style="list-style-type: none"> • Government ministers • Senior civil servants • Procurement officers • Private consultants (e.g., planners, designers, engineers, and surveyors)
Project selection, design, and budgeting	<ul style="list-style-type: none"> • Costly designs that increase consultants’ fees and contractors’ profits • Designs that favour a specific contractor • Incomplete designs that leave room for later adjustments (which can be manipulated) • High cost estimates to provide a cushion for the later diversion of funds • Political influence to get projects into the budget without appraisal 	<ul style="list-style-type: none"> • Government ministers • Senior civil servants • Procurement officers • Private consultants (e.g., planners, designers, engineers, and surveyors)

⁴⁴ Anand Rajaram et al, “A Diagnostic Framework for Assessing Public Investment Management” (World Bank, 2010), online: siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/FrameworkRajaram.pdf.

⁴⁵ Wells (March 2015) at 18.

Stages	Risks	Main actors
Tender for works and supervision contracts	<ul style="list-style-type: none"> • Bribery to obtain contracts (leaving costs to be recovered at later stages) • Collusion among bidders to allocate contracts and/or raise prices (potentially with assistance from procurement officers) • Interference by procurement officers to favour specific firms or individuals • Going to tender and signing contracts for projects that are not in the budget 	<ul style="list-style-type: none"> • Procurement officers • Private consultants (e.g., supervising engineer) • Contractors
Implementation	<ul style="list-style-type: none"> • Collusion between contractor and the supervising engineer (with or without the client’s knowledge) that results in the use of lower quality materials and substandard work • Collusion between contractors and the supervising engineer to increase the contract price or adjust the work required in order to make extra profits, cover potential losses, or recover money spent on bribes 	<ul style="list-style-type: none"> • Procurement officers • Private consultants (e.g., supervising engineer) • Contractors and subcontractors
Operation and maintenance, including evaluation and audit	<ul style="list-style-type: none"> • Agreement by the supervising engineer to accept poor quality work or work below the specification, leading to rapid deterioration of assets • A lack of allocated funds for maintenance, as new construction takes precedence in the project identification stage for future projects 	<ul style="list-style-type: none"> • Procurement officers • Private consultants (e.g., supervising engineer) • Contractors and subcontractors

Wells refers to an index developed by Dabla-Norris et al. to measure the efficiency (effectiveness) of public management of public investments in various countries.⁴⁶ Wells summarizes the index and the results of its application:

The index records the quality and efficiency of the investment process across four stages: (1) ex ante project appraisal, (2) project selection and budgeting, (3) project implementation, and (4) ex-post evaluation and audit.... A total of 71 low and middle income countries were scored on each of the four stages. The scoring involved making qualitative assessments on 17 individual components in each stage, with each component scored on a

⁴⁶ Era Debla-Norris et al, “Investing in Public Investment: An Index of Public Investment Efficiency”, IMF Working Paper WP/11/37 (2010), online: <https://www.imf.org/external/pubs/ft/wp/2011/wp1137.pdf>.

scale of 0 to 4 (with a higher score reflecting better performance). The various components were then combined to form a composite PIM index....

Unsurprisingly, Dabla-Norris et.al. (2011) found that low income countries and oil exporting countries had the lowest overall scores. The overall median score was 1.68, but scores ranged from a low of 0.27 (Belize) to a high of 3.50 (South Africa). The highest scores were among middle income countries (South Africa, Brazil, Colombia, Tunisia, and Thailand). Across regions, Eastern Europe and central Asian countries had relatively more developed PIM processes, followed by Latin America, East Asia, and the Pacific. The Middle East, North Africa, and sub-Saharan Africa regions trailed furthest behind....

More interesting than variations across countries and regions was the considerable variation in individual scores for each of the four stages. Generally, the first and last stages (ex-ante appraisal and ex post evaluation) were the weakest. The median score for project appraisal was only 1.33, with country scores ranging from 4 for South Africa and Colombia down to 0 for a number of low income countries. These included several in sub-Saharan Africa (Guinea, Chad, Sierra Leone, the Republic of Congo, and Sao Tome and Principe), as well as Trinidad and Tobago, Belize, the West Bank and Gaza, and the Solomon Islands....

The conclusion emerging from this exercise is that, while a number of countries have improved their project implementation (mainly through the introduction of procurement reforms), only a handful of developing countries have been able to improve the processes of project appraisal, design, and selection – hence moving towards better construction project management.⁴⁷

As discovered by governments in many countries, infrastructure procurement projects can be used for improper personal gain by public officials and others (e.g., through bribes, kickbacks, etc.) or for overt or clandestine political purposes. Wells refers to a study in Uganda in which Booth and Golooba-Mutebi⁴⁸ found that the price of road construction per kilometer in Uganda was twice as high as similar road construction in Zambia:

Booth and Golooba-Mutebi (2009, 5) concluded, “All of the evidence indicates that, under the pre-2008 arrangements, the roads divisions of the Ministry of Works operated as a well-oiled machine for generating corrupt earnings from kickbacks.” They went on to show how this operated as a

⁴⁷ Wells (March 2015) at 5.

⁴⁸ David Booth and Frederick Golooba-Mutebi, “Aiding Economic Growth in Africa: The Political Economy of Roads Reform in Uganda”, Overseas Development Institute Working Paper No 307 (September 2009), online: <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinionfiles/4965.pdf>.

complex system of political patronage. In addition to ensuring the personal enrichment of the minister, chief engineer, and many senior civil servants, the arrangement also provided a reliable means of accumulating funds to be made available to state house and other top government offices for “political” uses (such as patronage and campaign finance). Public officials raised money through a variety of means including accepting bribes for awarding contracts and signing completion certificates. The relative difficulty of skimming resources from donor-funded projects led to a situation where only a fraction of project funds made available by donors was being utilised.⁴⁹

The evidence before the Charbonneau Commission, discussed above in Section 1.3, in relation to corruption in public infrastructure projects in Quebec and the connection between those corrupt funds and illegal campaign financing demonstrates that these types of corrupt public infrastructure practices can also exist in countries, such as Canada, that are perceived to have low levels of corruption.

Effective project screening will align proposed investment with actual development needs. Wells notes that inadequate independent pre-screening of infrastructure projects can lead to the proverbial “white elephant” phenomenon. She refers to a 2013 World Bank study⁵⁰ that describes three types of white elephant projects:

- [Projects involving e]xcess capacity infrastructure, such as a road or airport with little or no traffic demand;
- Projects for which there is no operational budget to provide services that will be needed for success (such as hospitals or schools); and
- Capital investment in projects that are never completed (sometimes not even started) but are used to secure access to the contract value.

An example of the first type can be found in Angola, where close examination of the list of projects in 2011 revealed a bridge to be built in a remote area of the country’s southeast region for which there were no connecting roads—quite literally, this was a “bridge to nowhere.” This project could not have been approved with even a cursory evaluation (Wells, 2011).

The second type (also in Angola) is illustrated by the expansion of power generation capacity that was not matched by investment in transmission

⁴⁹ Wells (March 2015) at 7.

⁵⁰ “Investing to Invest: Strengthening Public Investment Management” (World Bank Poverty Reduction and Economic Management Network, May 2013) [unpublished, Country Clearance Version].

and distribution, so that the power could get to the users (Pushak and Foster, 2011).

The third type has been well-illustrated by the award of a contract for major road projects in Uganda. Part of the contract value was siphoned off and used for patronage payments, and many of the projects were never completed (Booth and Golooba-Mutebi, 2009). [footnotes omitted]⁵¹

2.3 Corrupt Procurement Offences

Corruption in public procurement occurs most frequently through bribes, extortion, bid-rigging and other forms of fraud. These types of corruption are discussed in more detail below.

2.3.1 Bribery

The OECD estimates that bribery in government procurement in OECD countries increases contract costs by 10-20%, suggesting that at least US\$400 billion is lost to bribery every year.⁵² The following are a few examples of how bribery of public officials can occur in relation to an infrastructure project:

- a government official may be bribed to either provide planning permission for a project or approve a design which does not meet the necessary regulations;
- a bidder may offer bribes to a government official in order to be improperly favoured throughout the bidding process, or to induce the official to manipulate the tender evaluation; or
- a bidder may make a donation to a certain political party in order to ensure preferential treatment.⁵³

Bribery and corrupt behaviour can also constitute other criminal offences such as extortion and fraud.

2.3.2 Extortion

The following are examples of how extortion—the making of a demand backed by force or threat—can manifest in public procurement:

- a bidder may threaten to harm a government official or the official's family unless the official gives unwarranted favourable treatment to the bidder;

⁵¹ Wells (March 2015) at 10.

⁵² OECD, *OECD Principles for Integrity in Public Procurement* (2009) at 9, online: www.oecd.org/gov/ethics/48994520.pdf.

⁵³ Global Infrastructure Anti-Corruption Centre, "How Corruption Occurs", online: www.giacentre.org/how_corruption_occurs.php.

- a government official may demand something in return for assisting a company to win a bid or for fair treatment of the company in the bidding process; and
- any situation that involves the payment of bribes can include an element of extortion.

2.3.3 Bid-Rigging, Kickbacks and Other Forms of Fraud

The public procurement process attracts fraudulent behaviour because it involves the exchange of massive amounts of money and resources.⁵⁴ Examples of fraud in public procurement include:

- where a bidder deliberately submits false invoices or other false documentation (with or without collusion of public officials);
- where bidders form a cartel and secretly pre-select the winners for certain projects;
- where a contractor submits false claims in order to receive more money or more time to complete a project; or
- various forms of illegally diverting money, such as money laundering and embezzlement.

These examples are just a few of the ways corruption manifests in public procurement. Given the great potential for many types of corrupt practices in public procurement, regulation of public procurement procedures should be a priority at all levels of government.

3. TYPES OF PUBLIC PROCUREMENT: P3s, SOLE SOURCING AND COMPETITIVE BIDDING

This section will describe the three main ways procurement occurs: P3s, sole sourcing and competitive bidding.

3.1 P3s

Procurement of large-scale, complex projects such as public infrastructure can involve construction-related public-private partnerships (P3s). Public Private Partnership Canada (PPP Canada),⁵⁵ a federal Crown corporation that facilitates P3 projects, defines a P3 as:

⁵⁴ Paul Fontanot et al, "Are You Tendering for Fraud?", *Keeping Good Companies* (April 2010) 146 at 146.

⁵⁵ In 2015, PPP Canada contributed to 13 P3 projects entering the market, 21 projects reaching financial close (with a combined value of over CAD\$14.1 billion), and 7 municipal P3 projects reaching financial close: PPP Canada, *Annual Report 2015–16* at 7, online:

<[www.p3canada.ca/~media/english/annual-reports/files/2015-2016 annual report.pdf](http://www.p3canada.ca/~media/english/annual-reports/files/2015-2016%20annual%20report.pdf)>.

A long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, from design and planning, to long-term maintenance.⁵⁶

Although P3s in the public infrastructure context can take many forms and can include a variety of attributes, at least three features tend to be present: (1) bundling of construction and operation, (2) private but temporary ownership of assets and (3) risk sharing over time between the public and private sector.⁵⁷ One distinguishing feature found in most major infrastructure P3s is that the private sector bears considerable (if not complete) responsibility for project financing. This follows from a core conceptual underpinning of the P3 model: project risks should be transferred to the party best able to manage those risks.⁵⁸ The transfer of financing responsibilities to the private sector is said to alleviate strains on public budgets and harness the efficiency and depth of private finance markets. Through a P3 arrangement, the costs of a project can be paid off over the project lifecycle, which poses less risk to both governments and taxpayers as compared to front-loaded arrangements.⁵⁹ In addition, many P3 arrangements take some form of a “concession” model, whereby a private sector concessionaire undertakes investment and operation of the project for a fixed period of time after which ownership of the assets reverts to the public sector.

Each P3 arrangement sits along a continuum between “purely public” and “purely private.”⁶⁰ A project sitting closer to the “private” end of the spectrum might include an agreement whereby private sector participants build, own and operate the infrastructure. This is commonly referred to as a public investment management system “BOO” (build-own-operate) arrangement.⁶¹ By contrast, a project sitting closer to the “public” end of the spectrum might involve an agreement whereby private sector participants merely operate and maintain the infrastructure. This is referred to as an “OM” (operate and maintain) arrangement.⁶²

⁵⁶ PPP Canada, “Frequently Asked Questions: What Is a P3?”, online: <www.p3canada.ca/en/about-p3s/frequently-asked-questions>.

⁵⁷ Eduardo Engel, Ronald Fischer & Alexander Galetovic, “Public-Private Partnerships: When and How” (19 July 2008) at 49, online: <www.econ.uchile.cl/uploads/publicacion/c9b9ea69d84d4c93714c2d3b2d5982a5ca0a67d7.pdf>.

⁵⁸ PPP Canada, “Frequently Asked Questions: What Is a P3?”

⁵⁹ Engel, Fischer & Galetovic (19 July 2008) at 49.

⁶⁰ Young Hoon Kwak, Ying Yi Chih & C William Ibbs, “Towards a Comprehensive Understanding of Public Private Partnership for Infrastructure Development” (2009) 51:2 *California Management Review* 51 at 54. Some suggest that based on the nature of the public-private relationship inherent in P3s, governments *set* policy while the private sector *implements* policy, invoking the metaphor of “governments steering and the private sector rowing”: Joan Price Boase, “Beyond Government? The Appeal of Public-Private Partnerships” (2000) 43:1 *Canadian Public Administration* 75 at 75.

⁶¹ *Ibid.*

⁶² *Ibid.*

Despite substantial private-sector involvement in many P3 arrangements, governments continue to maintain a substantial role in ensuring that P3 projects operate effectively. The government must provide a favourable investment environment, establish adequate regulatory frameworks and chains of authority, select a suitable procurement process, and maintain active involvement throughout the project lifecycle.⁶³ These responsibilities highlight the need to ensure that government officials are acting with honesty and integrity.

To distinguish between P3s and the other two models discussed below, we can look to the list of five essential differences between so-called “conventional procurement” and P3s, as outlined by the World Bank:

- 1) Conventional public procurement contracts for major public infrastructure typically last, at most, for only a few years (typically expiring within five years). P3s, by contrast, are long-term contracts that can exceed 30 years in duration. This creates an ongoing partnership relationship of interdependency and, as a result, the selection requirements, expectations, and procedures are very different.
- 2) Conventional public procurement contracts typically have as their object the construction of facilities, and the final product—which is often designed and planned by the public authority—can be tested and accepted at the end of the construction. P3s focus instead on the provision of a service with private sector participation in the delivery of that service. As such, conventional procurement tends to be more *input oriented*, whereas P3s are more *output oriented*.
- 3) In most P3s, the project proponent (i.e., the lead firm carrying out the project) creates a Special Purpose Vehicle (SPV) to develop, build, maintain, and operate the asset(s) for the life of the contract. The SPV constitutes a consortium that includes the building contractor, bank lender(s), and other private sector participants. The SPV is the entity that signs the contract with the government, and the SPV subcontracts out its various obligations. This unique way of structuring the contract and the various obligations is not typically found in conventional procurement.
- 4) Conventional procurement is typically a public-sector financed endeavor. It relies ultimately on taxpayer dollars. User fees, tariffs, direct payments from the public authority, loans, guarantees from lenders, equity contributions from P3 partners, or some combination thereof, by contrast, often finance P3s.
- 5) P3s, some argue, can reduce costs by allocating risks such as project failure or delays to parties best able to manage them, and private sector participants have

⁶³ *Ibid.*

stronger incentives to reduce costs in P3s as compared to conventional procurement.⁶⁴

PPP Canada suggests that the P3 model may be preferred over alternative models such as competitive bidding where the following conditions are present:

- You have a major project, requiring effective risk management throughout the lifecycle;
- There is an opportunity to leverage private sector expertise;
- The structure of the project could allow the public sector to define its performance needs as outputs/outcomes that can be contracted for in a way that ensures the delivery of the infrastructure in the long term;
- The risk allocation between the public and private sectors can be clearly identified and contractually assigned;
- The value of the project is sufficiently large to ensure that procurement costs are not disproportionate;
- The technology and other aspects of the project are proven and not susceptible to short-term obsolescence; and
- The planning horizons are long-term, with assets used over long periods and are capable of being financed on a lifecycle basis.⁶⁵

The likelihood that the P3 model will be selected over alternative models such as competitive bidding increases where there is significant scope for innovation and a long project lifecycle (e.g., the design, construction and operation of state-of-the-art hospitals). By contrast, where the project is comparatively simple and has a short project lifecycle (e.g., the installation of a simple transmission line), the likelihood that some other form of procurement will be selected increases.

Professors Engel, Fischer, and Galetovic suggest that P3s are the superior choice where there is a need to provide strong incentives to reduce or control project lifecycle costs.⁶⁶ This is because in the P3 arrangement, the private-sector participant involved in the operation of the project has an incentive to minimize costs while still meeting project standards, since the firm shares in the economic savings derived from any cost-cutting measures that enhance the project. This can, however, present problems to the extent that such measures reduce the quality of service.⁶⁷ Engel, Fischer, and Galetovic also suggest that P3s may be the superior

⁶⁴ World Bank, "Procurement Arrangements Application to Public-Private Partnerships (PPP) Contracts Financed under World Bank Projects", Guidance Note (September 2010) at 14, online: <ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/GuidanceNote_PPP_September2010.pdf>.

⁶⁵ PPP Canada, "Frequently Asked Questions: What Is a P3?"

⁶⁶ Engel, Fischer & Galetovic (19 July 2008) at 49.

⁶⁷ *Ibid* at 50.

choice where demand risk is largely exogenous and there is a large upfront investment.⁶⁸ The authors add, however, that any form of public procurement—such as P3s or competitive bidding—should be pursued only where full privatization is not possible.⁶⁹ This will generally be the case where competition is not feasible.⁷⁰

Note that despite the foregoing observations, P3s can—and often do—contain elements of the competitive bidding model. For example, private-sector partners are often selected based on a competitive bidding process, as described in Section 3.3 below.

P3s have gained ascendancy on the world stage as a preferred model of delivering large-scale infrastructure goods and services to the public. Between 1985 and 2004, 2,096 P3 infrastructure projects were undertaken worldwide, with a combined capital value of nearly US\$887 billion.⁷¹ The World Bank estimates that the private sector financed approximately 20% of infrastructure investments in developing countries in the 1990s, totaling about US\$850 billion.⁷²

Enthusiasm for P3s can be found in Canada as well. In 2009, then–prime minister Stephen Harper created P3 Canada Inc.—a Crown corporation—in order to deepen Canada’s commitment to P3s. Harper opined, “[P3s are] an excellent additional tool to allow taxpayers to share risk and thus help get projects completed on time and on budget.”⁷³ As noted by the Council of Canadians, the Harper government originally created a \$14 billion Building Canada Fund that required federal support be approved by P3 Canada, essentially entrenching the P3 model as the preferred model for large, federally funded infrastructure projects.⁷⁴ In addition, provinces such as British Columbia and Ontario have, at various times and in various capacities, adopted and expressed support for the P3 model. Thus, in Canada,

⁶⁸ *Ibid* at 49.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

⁷¹ AECOM Consult, Inc, “Synthesis of Public-Private Partnership Projects for Roads, Bridges & Tunnels from Around the World, 1985-2004” (United States Department of Transportation, 2005), cited in Young Hoon Kwak, YingYi Chih & C William Ibbs (2009) at 56.

⁷² See Mona Hammami, Jean-Francois Ruhashyankiko & Etienne B Yehoue, “Determinants of Public-Private Partnerships in Infrastructure”, International Monetary Fund, WP/06/99 (April 2006) at 3, online: <www.imf.org/external/pubs/ft/wp/2006/wp0699.pdf>.

⁷³ Brent Patterson, “Trudeau Abandons Harper’s Unpopular P3 Requirement for Infrastructure Funding”, The Council of Canadians (19 November 2015), online: <canadians.org/blog/trudeau-abandons-harpers-unpopular-p3-requirement-infrastructure-funding>.

⁷⁴ *Ibid*.

P3s are an increasingly popular mechanism for public procurement, with proponents highlighting their economic efficiency.⁷⁵

However, views on the advisability of P3s are mixed. Detractors argue that P3s—rather than being efficient, revolutionary models of delivering public goods and services—“cost more and deliver less.”⁷⁶ Some scholars, such as Minow, Custos and Reitz, have criticized P3s for failing to sufficiently protect public values and interests.⁷⁷ Scholars who espouse this view argue that P3s can open the door to private capture of public decision makers.⁷⁸

3.2 Sole Sourcing

Although most public procurement now occurs through a competitive bidding process, the sole source contracting method is still used for some services. Plainly stated, sole source contracting involves two parties negotiating a contract, without an open competitive process.⁷⁹ Sole sourcing may be preferred for efficiency purposes in emergencies, for small value contracts, or where there are confidentiality concerns.⁸⁰ However, as sole sourcing is not a public and transparent process, it can be difficult for public bodies to justify this

⁷⁵ The Canadian Council for Public-Private Partnerships, *Public-Private Partnerships, A Guide for Municipalities* (2011) at 10, online: <www.p3canada.ca/en/about-p3s/p3-resource-library/public-private-partnerships-a-guide-for-municipalities/>. See also Maurice Rachwalski, *Public Sector Capacity to Plan and Deliver Public/Private Infrastructure Partnerships (P3s): A Case Study of British Columbia's Healthcare Sector* (PhD Thesis, University of Victoria School of Public Administration, 2013) [unpublished].

⁷⁶ See e.g. Toby Sanger, “Ontario Audit Throws Cold Water on Federal-Provincial Love Affair with P3s”, Canadian Centre for Policy Alternatives (2 February 2015), online: <<https://www.policyalternatives.ca/publications/monitor/ontario-audit-throws-cold-water-federal-provincial-love-affair-p3s-sthash.SKJBMSP6.dpu>>. For an extended discussion of the merits and critiques of P3s, see Young Hoon Kwak, YingYi Chih & C William Ibbs, “Towards a Comprehensive Understanding of Public Private Partnership for Infrastructure Development” (2009) 51:2 *California Management Review* 51; Eduardo Engel, Ronald Fischer & Alexander Galetovic, “Public-Private Partnerships: When and How” (19 July 2008), online: <www.econ.uchile.cl/uploads/publicacion/c9b9ea69d84d4c93714c2d3b2d5982a5ca0a67d7.pdf>; World Bank, Asian Development Bank & Inter-American Development Bank, “Public-Private Partnerships Reference Guide”, Version 2.0 (2014), online: <api.ning.com/files/lumatxx-0jz3owSB05xZDkmWIE7GTVYA3cXwt4K4s3Uy0NtPPRgPWYO1lLrWaTUqybOeTXIeuSYUxbPFWlysyuNl5rL6b2Ms/PPPReferenceGuidev02Web.pdf>.

⁷⁷ Robert Klitgaard, *Addressing Corruption Together* (OECD, 2015) at 5, online: <www.oecd.org/dac/governance-peace/publications/FINAL_Addressing_corruption_together.pdf>.

⁷⁸ See *ibid* at 5, 7.

⁷⁹ Robert C Worthington, “Legal Obligations of Public Purchasers” (Treasury Board of Canada Secretariat, May 2002), online: <www.tbs-sct.gc.ca/cmp/doc/lopp_olap/lopp_olap-eng.asp>.

⁸⁰ *Ibid*.

method due to concerns relating to fairness and discrimination.⁸¹ From an anti-corruption perspective, a public entity should sole source its contracts as seldom as possible.

One added complication in the sole-sourcing context is the phenomenon of unsolicited bids.⁸² Some public authorities are willing to consider project proposals initiated, designed and submitted by private firms, rather than the authority itself. This flips the traditional competitive bidding model on its head: the idea for the project comes not from the public authority, but from the private sector.

Although unsolicited bids may be seen as a welcome opportunity to introduce greater private sector participation in the identification of public needs, as well as to inject private sector innovation into the delivery of public goods and services, they may also be a dangerous proposition. The result of increased acceptance of unsolicited bids may be to allow private firms to intrude upon the government's role in formulating policy and designing public infrastructure to achieve public policies.

Perhaps the principal issue with unsolicited bids is that they may be associated with a lack of competition and transparency.⁸³ In an unsolicited bid, where there is only one party seeking an exclusive contract for a project that was drawn up by that party, the public might perceive the proposed project as serving special interests or being tainted by corruption.⁸⁴

Professors Hodge and Greve summarize the concerns raised over unsolicited bids:

[Unsolicited bids add] a whole new dimension to project initiation, planning and completion with new powerful interest groups moving in alongside elected governments. Thus, we see today new infrastructure projects being suggested by real estate agents as well as various project financiers and merchant bankers, rather than bureaucrats—whose purpose, one would have thought, would be to do just this, as well as analyzing a range of smaller packages of alternative improvement options. Whilst such

⁸¹ *Ibid.*

⁸² For a detailed discussion of unsolicited bids, see John T Hodges & Georgina Dellacha, "Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency", Working Paper No 1 (Public Private Infrastructure Advisory Facility, 2007), online: [www.ppiaf.org/sites/ppiaf.org/files/publication/WP1-Unsolicited Infra Proposals - JHodges GDellacha.pdf](http://www.ppiaf.org/sites/ppiaf.org/files/publication/WP1-Unsolicited%20Infra%20Proposals%20-%20JHodges%20GDellacha.pdf).

⁸³ See Hodges & Dellacha (2007) at vi.

⁸⁴ *Ibid* at 1.

government-business deals may well end up meeting the public interest, it would seem more by coincidence than by design.⁸⁵

Hodges and Dellacha suggest that, with unsolicited bid submissions, it may be best for the public authority to hold a tendering process nonetheless in order to preserve some level of competition and enhance transparency, even if there is only one bidder.⁸⁶ This is said to (1) evidence the government's commitment to transparency and (2) demonstrate that there is in fact only one interested bidder.⁸⁷ The effect is to lend the project greater legitimacy in the public eye.

At the end of the day, whether unsolicited bids serve the public interest will depend on the particular circumstances surrounding the proposed project, including the actors involved, the need for the project, whether the party proposing the project is the only one who could successfully carry it out, and other factors.

3.3 Competitive Bidding

Public procurement more often occurs through the process of competitive bidding, or tendering. Though tendering is often used synonymously with bidding, tendering is a specific type of competitive bidding. The tendering process involves particular contractual relationships and obligations, which will be discussed later in this chapter. Broadly speaking, there are four stages of the traditional competitive bidding process: planning, bidding, bid evaluation, and implementation and monitoring.⁸⁸ These are also the basic stages in the P3 context, although some details vary. There can be many parties involved throughout the various stages of the bidding process. The bidder is the party or individual responding to the call for bids in the hope of winning the contract. The next section will focus on situations in which a government entity or official is the party requesting tenders. Other stakeholders can include contractors, engineers, agents, sub-contractors and suppliers. The following four stages briefly describe the procurement process:

1. **Planning:** This stage involves needs assessment, advertising, the production of bidding documents, and the formation of a procurement plan.⁸⁹ At this stage, the government assesses what is necessary to serve the public interest, with

⁸⁵ Graeme Hodge & Carsten Greve, "The PPP Debate: Taking Stock of the Issues and Renewing the Research Agenda" (Paper presented at the International Research Society for Public Management Annual Conference, Brisbane, Australia, 26-28 March 2008), cited in World Bank & Department for International Development of the United Kingdom, *Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners* (June 2009) at 36, n 30, online: <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/07/04/000386194_20120704034652/Rendered/PDF/708460ESW0P1050e0Practices0in0PPPs.pdf>.

⁸⁶ Hodges & Dellacha (2007) at 3.

⁸⁷ *Ibid.*

⁸⁸ Kühn & Sherman (2014) at 7.

⁸⁹ *Ibid.*

consideration to factors such as cost and timeliness.⁹⁰ The administrative and technical documents needed for launching the call for bids are prepared.⁹¹

2. **Bidding:** Candidates are short-listed, the government holds pre-bid conferences, the bids are submitted, and questions about the respective bids are clarified.⁹² There are various types of bidding procedures that may be employed at this stage. For example, Public Works and Government Services Canada (PWGSC) uses two bidding approaches: tenders and proposal calls.⁹³ In the tender process, the government will solicit tenders through an Invitation to Tender (ITT) or Request for Quotation (RFQ).⁹⁴ Tenders are used when the government is searching for technical compliance with contract requirements and the lowest acceptable price for a specifically defined project.⁹⁵ On the other hand, when using the call for proposals approach, the government will issue a Request for Proposal (RFP), Request for Standing Offer (RFSO), or Request for Supply Arrangement (RFSa). Proposal calls—particularly RFPs—are used for complex or lengthy construction projects, and are most likely to be used in the P3 context.⁹⁶ Where the government is contemplating a P3, a Request for Qualifications (RFQu) is often issued prior to RFPs.⁹⁷ RFQs help the government to identify a shortlist of qualified bidders who will be invited to submit proposals at the RFP stage.
3. **Bid evaluation:** The bids are evaluated, the government compiles a bid evaluation report, and the contract is awarded to the winning bidder.⁹⁸ The process by which the bids are evaluated and the contract granted varies according to the bidding approach selected, as well as the governing legislation. For example, in Canada, PWGSC requires that RFPs be evaluated transparently and that debriefs be provided to losing bidders.⁹⁹
4. **Implementation and monitoring:** The final contract between the bidder and the government is drafted and implemented, any changes are incorporated, the bidder's project is monitored and audited, and any appeals are launched.¹⁰⁰

⁹⁰ OECD *Principles for Integrity in Public Procurement* (2009) at 77.

⁹¹ *Ibid* at 81.

⁹² Kühn & Sherman (2014) at 7.

⁹³ Public Works and Government Services Canada, "Procurement Management Manual", online: <www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/approv-procure/manuelga-pmmanual-8-eng.html>.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ The Canadian Council for Public-Private Partnerships, *Public-Private Partnerships, A Guide for Municipalities* (2011) at 29, online: <www.p3canada.ca/en/about-p3s/p3-resource-library/public-private-partnerships-a-guide-for-municipalities/>.

⁹⁸ Kühn & Sherman (2014) at 7.

⁹⁹ *Ibid* at 30.

¹⁰⁰ *Ibid*.

4. HALLMARKS OF A GOOD PROCUREMENT SYSTEM

Governments have many goals in enacting public procurement laws, including fair competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity. Competition, integrity and transparency are often viewed as most important.¹⁰¹

4.1 Transparency

Transparency is important because it reduces the risk of corruption and bribery by opening up the procurement process to monitoring, review, comment and influence by stakeholders.¹⁰² Transparency was explained at the 1999 International Anti-Corruption Conference as:

Transparency, in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed. Transparency is a central characteristic of a sound and efficient public procurement system and is characterised by well-defined regulations and procedures open to public scrutiny, clear standardised tender documents, bidding and tender documents containing complete information, and equal opportunity for all in the bidding process. In other words, transparency means the same rules apply to all bidders and that these rules are publicised as the basis for procurement decisions prior to their actual use.¹⁰³

Former Secretary-General of the United Nations Ban Ki-moon describes the connection between transparency and public procurement in the following terms:

Transparency is a core principle of high-quality public procurement. An open and transparent procurement process improves competition, increases efficiency and reduces the threat of unfairness or corruption. A robust transparency regime enables people to hold public bodies and politicians to account, thereby instilling trust in a nation's institutions. Transparency also

¹⁰¹ Steven L Schooner, "Desiderata: Objective for a System of Government Contract Law" (2002) 11:2 Public Procurement Law Review 103 at 104.

¹⁰² Kühn & Sherman (2014) at 12.

¹⁰³ Wayne A Wittig, "A Strategy for Improving Corruption in Public Procurement" (Paper presented at the International Anti-Corruption Conference, Durban, ZA, 10–15 October 1999), online: http://9iacc.org/papers/day2/ws2/d2ws2_wwittig2.html.

supports the wise use of limited development funds, from planning investments in advance to measuring the results.¹⁰⁴

Transparency in public procurement can be enhanced by implementing a number of best practices, including:

- publishing procurement policies;
- advance publication of procurement plans;
- advertisement of tender notices;
- disclosure of evaluation criteria in solicitation documents;
- publication of contract awards and prices paid;
- establishing appropriate and timely complaint and dispute mechanisms;
- implementing financial and conflict of interest disclosure requirements for public procurement officials; and
- publishing supplier sanction lists.¹⁰⁵

Transparency encourages public confidence in the project, which is particularly important in a democracy. Without transparency, corruption is free to continue in the shadows. With transparency, corruption is subject to the glare of public scrutiny. As Justice Louis Brandeis once wrote, “[s]unlight is said to be the best of disinfectants.”¹⁰⁶

Although transparency is recognized as a key condition for promoting integrity and preventing corruption in public procurement, it must be balanced with other imperatives of good governance.¹⁰⁷ For example, demands for greater transparency and accountability may create some tension with the objective of ensuring an efficient management of public resources (administrative efficiency) or providing guarantees for fair competition.¹⁰⁸ The challenge for policy makers is to design a system in which an appropriate degree of transparency and accountability is present to reduce corruption risks while still pursuing other aims of public procurement.

¹⁰⁴ Ban Ki-moon, “Foreword” in United Nations, *Supplement to the 2011 Annual Statistical Report on United Nations Procurement* (2011) i, online:

<https://www.un.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>.

¹⁰⁵ Therese Ballard, “Transparency in Public Procurement” in United Nations, *Supplement to the 2011 Annual Statistical Report on United Nations Procurement* (2011) 2 at 2, online:

<https://www.un.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>

¹⁰⁶ Louis D Brandeis, *Other People’s Money*, online: University of Louisville <www.law.louisville.edu/library/collections/brandeis/node/196>.

¹⁰⁷ OECD, *Integrity in Public Procurement: Good Practice from A to Z* (2007) at 10, online: <www.oecd.org/development/effectiveness/38588964.pdf>.

¹⁰⁸ *Ibid.*

4.2 Competition

Competition is seen as vital to the process because, under laissez-faire economic theory, it provides governments with the best quality for the best price.¹⁰⁹ Anderson, Kovacic and Müller identify three leading reasons why competition is important in public procurement:

- 1) with free entry and an absence of collusion, prices will be driven towards marginal costs;
- 2) suppliers will have an incentive to reduce their production and other costs over time; and
- 3) competition drives innovation.¹¹⁰

4.3 Integrity

TI defines integrity as “behaviours and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions that create a barrier to corruption” and notes that integrity requires that procurement be carried out in accordance with the law and without discrimination or favouritism.¹¹¹

In 2008, the OECD developed best practices guidance to “reinforce integrity and public trust in how public funds are managed”¹¹² and promote a good governance approach to procurement based on the following principles:

Transparency

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

¹⁰⁹ Schooner (2002) at 105.

¹¹⁰ Robert D Anderson, William E Kovacic & Anna Caroline Müller, “Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance” in United Nations, *Supplement to the 2011 Annual Statistical Report on United Nations Procurement* (2011) 9 at 10, online: <https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>.

¹¹¹ Transparency International, *The Anti-Corruption Plain Language Guide* (2009) at 24, online: <https://www.transparency.de/fileadmin/pdfs/Themen/Wirtschaft/TI_Plain_Language_Guide_28070_9.pdf>.

¹¹² OECD, *OECD Principles for Integrity in Public Procurement* (2009) at 3, online: <www.oecd.org/gov/ethics/48994520.pdf>.

Good management

3. Ensure that public funds are used in procurement according to the purposes intended.
4. Ensure that procurement officials meet high professional standards of knowledge, skills, and integrity.

Prevention of misconduct, compliance and monitoring

5. Put mechanisms in place to prevent risks to integrity in public procurement.
6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.
7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

Accountability and control

8. Establish a clear chain of responsibility together with effective control mechanisms.
9. Handle complaints from potential suppliers in a fair and timely manner.
10. Empower civil society organizations, media and the wider public to scrutinise public procurement.¹¹³

This list illustrates how the three key pillars of an effective procurement system—transparency, competition, and integrity—are closely connected to one another.

Although sound procurement rules are essential to the achievement of a robust procurement system, rules alone are not sufficient. As the OECD observes:

Implementing rules requires a wider governance framework that encompasses: an adequate institutional and administrative infrastructure; an effective review and accountability regime; mechanisms to identify and close off opportunities for corruption; as well as adequate human, financial and technological resources to support all of the elements of the system. They also require a sustained political commitment to apply these rules and regularly update them.¹¹⁴

¹¹³ OECD, *Checklist for Enhancing Integrity in Public Procurement* (2008), online: <<https://www.oecd.org/gov/41760991.pdf>>.

¹¹⁴ OECD, *Implementing the OECD Principles for Integrity in Public Procurement: Progress Since 2008* (2013) at 24–25, online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>.

5. PRIVATE LAW ENFORCEMENT OF TENDERING FOR PUBLIC CONTRACTS

Private law remedies are not the focus of the analysis of procurement in this chapter. However, the following is a brief overview of how companies may use private law tools to ensure that government bodies in the US, UK and Canada follow tendering processes. Even where the purchaser is a government body, procurement contracts are considered “generally commercial in nature” and therefore typically fall into the realm of private law remedies.¹¹⁵ Generally, the private law framework allows companies to seek a private law remedy (damages) against the public body.

It is somewhat problematic that a private law action for damages is by far the most common remedy sought in public procurement disputes.¹¹⁶ Because civil actions are expensive, legal recourse is often inaccessible to smaller bidders who cannot afford the legal costs, or where the value of the procurement contract does not economically warrant a lawsuit. Moreover, the settlement of private lawsuits often involves confidentiality agreements that impede public transparency. All three countries have public law bodies in place to hear complaints about the procurement process and resolve disputes between the contracting bodies. However, the remedies available in the public law context do not always sufficiently account for the damages the contracting party has suffered.

5.1 US Private Law

The *Contract Disputes Act of 1978 (CDA)*¹¹⁷ provides a mechanism for parties to make a claim in contract law against the federal government. Bid protests are heard by the Government Accountability Office (GAO) or the Court of Federal Claims. The GAO hears the majority of the protests.¹¹⁸ The GAO has not allowed losing bidders to claim lost profits as part of their damages. Instead, companies are limited to seeking the costs of preparing their quotation and filing their protest.¹¹⁹ This position was solidified in the *Effective Learning* decision:

[W]e know of no situation where anticipated profits may be recovered when the underlying claim is based upon equitable, rather than legal principles...Here, since a contract between the government and Effective

¹¹⁵ *Irving Shipbuilding Inc v Canada (AG)*, 2009 FCA 116 at para 21, 314 DLR (4th) 340.

¹¹⁶ Decentralization Thematic Team, “Accountability, Transparency and Corruption in Decentralized Governance”, World Bank, online: <<https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html>>.

¹¹⁷ *Contract Disputes Act of 1978*, codified as amended at 41 USC §§ 4101–7109.

¹¹⁸ Kate M Manuel & Moshe Schwartz, *GAO Bid Protests: An Overview of Time Frames and Procedures* (Congressional Research Services, 2014) at 1, online: <<https://www.fas.org/sgp/crs/misc/R40228.pdf>>.

¹¹⁹ *Introl Corp B-218339*, 9 July 1985, 85-2 CPD 35, online at: <[www.gao.gov/products/422301 - mt=e-report](http://www.gao.gov/products/422301-mt=e-report)>.

Learning never came into being, the only relief possible was equitable in nature. Hence, the monetary recovery in this situation was limited to the reasonable value of services and did not encompass any potential profits that might have been earned by Effective Learning.¹²⁰

The GAO's position on damages stems from precedential inability of parties who do not secure a contract to sue and seek damages.¹²¹ US law requires a contract to exist between the parties before a plaintiff is entitled to seek anticipated profits.¹²² Unlike in Canada and the UK, US law does not imply a contract between the party soliciting bids and the bidding parties; the only contract that exists is when the party soliciting bids selects one of the bids. At that point, the government agency and the bidding party form a contract for services, goods or construction.

However, US law has developed to a point that allows disgruntled bidding parties to bring an action against the federal government for failure to follow its procurement laws and procedures. In 1940, the Supreme Court held in *Perkins v Lukens Steel Co* that aggrieved parties lacked standing in federal court to challenge government contract awards where they failed to receive the contract.¹²³ In a subsequent case, *Heyer Products Co v United States*, the United States Court of Claims found an implied commitment in procurement requests to consider each bid fairly and honestly, and allowed an unsuccessful bidder to file a claim for "bid preparation expenses."¹²⁴ In *Scanwell Laboratories v Shaffer*, the US Court of Appeals for the District of Columbia Circuit held that the *Administrative Procedure Act*¹²⁵ reversed *Perkins* and that review of public procurement decisions was available in district courts.¹²⁶

5.2 UK Private Law

English courts established in *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* that when an organization, particularly a public sector body, invites tenders to be submitted they are giving an implicit promise to strictly adhere to the tendering rules set out for the particular tender.¹²⁷ Failure to do so will give aggrieved parties the right to bring an action

¹²⁰ *Effective Learning, Inc – Request for Review of Prior Claim Decision*, B-215505, 19 Feb 1985, 85-1 CPD 207, online: <www.gao.gov/assets/470/461929.pdf>.

¹²¹ Duncan Fairgrieve & François Lichère, eds, *Public Procurement Law: Damages as an Effective Remedy* (Portland: Hart, 2011) at 202.

¹²² *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956), prevented unsuccessful bidders from making a claim for lost profits because there was no contract upon which to base this claim. *Cincinnati Electric Corp v Kleppe*, 509 F (2d) 1080 (6th Cir 1975), upheld the finding that the only loss the unsuccessful bidder could claim was the cost of preparing the bid.

¹²³ *Perkins v Lukens Steel Co*, 310 US 113 (1940).

¹²⁴ *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956).

¹²⁵ *Administrative Procedure Act*, codified as amended at 5 USC §§ 551-59 (1946).

¹²⁶ *Scanwell Laboratories v Shaffer*, 424 F (2d) 859 (DC Cir 1970).

¹²⁷ *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195 (CA).

for damages. Further, in *Hughes Aircraft Systems International v Airservices Australia*, the Federal Court of Australia held that the procuring party was under a contractual obligation to apply the tender process criteria they had advertised along with the call for tenders.¹²⁸

This principle developed further in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*, in which the High Court pronounced that when tenders are sought by the public sector, a contract exists between the bidder and public body that requires all tenders to be considered fairly. In *Harmon*, the trial judge found that the bids had been manipulated and the defendant had chosen a bid over the plaintiff's, who was in fact the lowest bidder.¹²⁹ The judge found this to be a breach of contract:

In the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.¹³⁰

This creates a contract distinct from the contract being tendered for and requires that the purchaser abide by the terms it sets out in its call for tenders.

5.3 Canadian Private Law

The legal framework for procurement in Canada was established in the seminal case *The Queen (Ont) v Ron Engineering*.¹³¹ This case created the concept of dual contracts in procurement cases.¹³² Contract A is formed when a call for tenders is issued (the offer) and a bid is submitted in response (the acceptance).¹³³ Contract B arises between the entity calling for tenders and the successful bidder.

In Quebec, although *Ron Engineering* has been applied by the courts, the same results are obtained under civil law principles of offer and acceptance.¹³⁴ This is because Quebec's *Civil Code* imposes obligations on the parties arising from pre-contractual negotiations even

¹²⁸ *Hughes Aircraft Systems International v Airservices Australia*, (1997) 146 ALR 1 (FC).

¹²⁹ *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*, (1999) 67 Con LR 1, [1999] EWHC Technology 199.

¹³⁰ *Ibid.*

¹³¹ *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 27, 1981 CanLII 17.

¹³² Prior to *Ron Engineering*, it was believed that no formal contractual relationships arose until the acceptance of a bid. See e.g. *Belle River Community Arena Inc v WJC Kaufmann Co*, 20 OR (2d) 447, 87 DLR (3d) 761 (CA).

¹³³ This is a simplification; Contract A will not always be formed upon the submission of a tender. For example, a contract will arise only where there is a clear intention to contract. However, what is relevant is that the submission of a tender will often give rise to contractual obligations. See *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at paras 17, 19, 23, 170 DLR (4th) 577.

¹³⁴ *Civil Code of Québec*, SQ 1991, c 64, Articles 1385, 1396. See *Halsbury's Laws of Canada, Construction* (2013 Reissue) at para HCU-18 [online edition].

though no contractual relationship arises between the party calling for tenders and the bidder before acceptance of the bid.¹³⁵

After *Ron Engineering*, the Supreme Court of Canada further developed this dual contract procurement paradigm. In *MJB Enterprises Ltd v Defence Construction*, the Court established that Contract A will only form between the procuring entity and compliant bidders.¹³⁶ A compliant bidder is one whose bid complies with the requirements of the tender documents. This requirement ensures a degree of fairness and transparency. *MJB* also clarified that the terms of Contract A are dictated by the terms and conditions of the tender call.¹³⁷ In *Martel Building Ltd v Canada*, the Court held that procuring entities have an obligation of fairness towards bidders with whom Contract A has formed.¹³⁸ Purchasers must be “fair and consistent,” and treat all bidders “fairly and equally.”¹³⁹ This means, at minimum, that when a purchaser sets the bid requirements, the purchasing entity must fairly evaluate each bidder based upon the indicated criteria. *Design Services Ltd v Canada* clarified that the duty of care owed by the procuring entity to bidders does not extend to subcontractors.¹⁴⁰

The 2014 Federal Court case *Rapiscan Systems, Inc v Canada (AG)* held that government procurement decisions could be subject to the administrative law remedy of judicial review if an “additional public element” exists.¹⁴¹ The Federal Court outlined numerous considerations to help determine the presence of an “additional public element;” where the procurement decision is closely connected to the procuring entity’s statutory powers or mandate, it is more likely that the public law remedy of judicial review will be available.¹⁴² The operative question is whether “the matter is coloured with a “public element” sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that (i) it involves a breach of a statutory duty, or (ii) it undermines the integrity of government procurement processes.”¹⁴³

Judy Wilson and Joel Richler of Blake, Cassels & Graydon LLP extract three principles from the line of jurisprudence emanating from *Ron Engineering*:

[F]irst, the law imposes obligations on both the procuring authorities and the bidders. Procuring authorities must, at all times, adhere to the terms and conditions of Contract A and cannot accept any non-compliant bids, no

¹³⁵ *Ibid.*

¹³⁶ *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 30, 170 DLR (4th) 577.

¹³⁷ *Ibid* at para 22.

¹³⁸ This is a simplification. This will be true except where it is clear that the parties did not expect and intend fair and consistent treatment. See *Martel Building Ltd v R*, 2000 SCC 60 at para 88, 193 DLR (4th) 1.

¹³⁹ *Ibid* at paras 88, 84.

¹⁴⁰ *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737.

¹⁴¹ *Rapiscan Systems, Inc v Canada (Attorney General)*, 2014 FC 68 at paras 50–51, 369 DLR (4th) 526.

¹⁴² *Ibid* at para 51.

¹⁴³ *Ibid.*

matter how attractive they may be. As well, procuring authorities must act towards all compliant bidders fairly and in good faith, particularly during the evaluation of any bidder's submission. Also, procuring authorities cannot make their ultimate decisions to award or reject submissions based on criteria that are not disclosed in the terms and conditions of the procurement documents. Bidders, for their part, cannot revoke or supplement their submissions, unless permitted to do so by the terms and conditions of Contract A.

Second, the law *does* permit procuring authorities to create the terms and conditions of Contract "A" as they see fit. Thus, privilege clauses – clauses which provide the procuring authority with discretionary rights – are recognized as fully enforceable and, if properly drafted, allow procuring authorities to reserve to themselves the right to award contracts to bids that may not be for the lowest price, or not to award contracts at all. As well, procuring authorities are free to impose any number of criteria on bidders such as: prior similar work experience; the absence of claims or prior litigation; local contracting; scheduling criteria; composition of construction teams; and so on.

Third, and perhaps somewhat contradictory of the second principle, while the list of requirements and criteria imposed on bidders may be extensive, it will always be open to the courts to impose limitations where the discretion retained by the procuring authority is extreme. The courts have made it clear that maintaining the integrity of competitive procurement processes was a fundamental goal of procurement law in Canada.¹⁴⁴

6. PUBLIC LAW FRAMEWORK

6.1 International Legal Instruments

6.1.1 UNCAC

Article 9(1) of UNCAC requires State parties "establish systems of procurement based on transparency, competition and objective criteria in decision-making, and which are also

¹⁴⁴ Jody Wilson & Joel Richler, "Canadian Procurement Law: The Basics", Blake, Cassels & Graydon LLP (23 September 2011) [emphasis in original], online:

www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1385.

effective in preventing corruption.”¹⁴⁵ As the *Legislative Guide* to UNCAC notes, Article 9 includes, at minimum:

- a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
- b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
- c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
- d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to paragraph 1 of article 9 are not followed;
- e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.¹⁴⁶

As with other international agreements that address domestic procurement, UNCAC contemplates that these requirements may not apply to contracts below a certain dollar threshold.¹⁴⁷ The *Legislative Guide* to UNCAC justifies this exception on the grounds that “excessive regulation can be counterproductive by increasing rather than diminishing vulnerability to corrupt practices,” but does not provide further elaboration.¹⁴⁸

6.1.2 OECD Anti-Bribery Convention

The OECD Convention contains no articles on public procurement. However, the *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials*, adopted in November 2009, includes the following as Recommendation XI:

¹⁴⁵ United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (United Nations, 2012) at 28, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

¹⁴⁶ *Ibid* at 29–30.

¹⁴⁷ *Ibid* at 29.

¹⁴⁸ *Ibid*.

Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organizations such as the United Nations, the World Trade Organization (WTO) and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.¹⁴⁹

Recommendation XI(i) states that member states should, through laws and regulations, permit authorities to suspend enterprises convicted of bribery of foreign public officials from competition for public contracts.

6.1.3 The World Bank

The World Bank funds large infrastructure projects throughout the developing world. According to the World Bank, its procurement system includes a portfolio of approximately US\$56 billion across 172 countries.¹⁵⁰ To combat corruption, the World Bank has created its own sanctioning system, which relies heavily on debarment as a penalty. Because of a reciprocal agreement between the World Bank and other development banks, debarment from World Bank projects also leads to debarment from projects funded by the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.¹⁵¹ This is commonly referred to as “cross-debarment.” For more on the World Bank’s sanctioning process, see Section 8.3 in Chapter 7.

In July 2015, the World Bank announced a new Procurement Framework, which came into effect on July 1, 2016.¹⁵² Most notably, the new framework allows contract award decisions to be based on criteria other than lowest price. In this respect, “value for money” was introduced as a core procurement principle. This signals “a shift in focus from the lowest evaluated compliant bid to bids that provide the best overall value for money, taking into

¹⁴⁹ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online: <www.oecd.org/daf/anti-bribery/44176910.pdf>.

¹⁵⁰ World Bank, Press Release, “New World Bank Procurement Framework Promotes Strengthened National Procurement Systems” (30 June 2016), online: <www.worldbank.org/en/news/press-release/2016/06/30/new-world-bank-procurement-framework-promotes-strengthened-national-procurement-systems>.

¹⁵¹ Graham Steele, *Quebec’s Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Schulich School of Law, 2015) at 54, online: <dalspace.library.dal.ca/handle/10222/56272>.

¹⁵² Guidance on the framework, as well as the framework itself, can be accessed online: <www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework>.

account quality, cost, and other factors as needed.”¹⁵³ In addition, the World Bank prepared a series of “Standard Procurement Documents” requiring bidders to provide beneficial ownership information.¹⁵⁴ This followed after the World Bank announced it would be considering ways of collecting and disseminating information on beneficial ownership of entities participating in its procurement processes, having received a letter signed by 107 civil society organizations encouraging it to do so.¹⁵⁵

The procurement process has been subject to some criticism. After noting that the *FCPA* provides little deterrence to companies operating in countries where demand for bribes is high and profits to be made are great, US lawyer and academic Leibold criticized the World Bank’s conduct when financing a pipeline project in Chad:

Even the World Bank was ineffective at preventing corruption there. It rushed the pipeline project, ignored important information about the empirical nature of the resource curse, and divorced its own analysis from Chad’s political and economic context.¹⁵⁶

Another US academic Sarlo criticized the World Bank’s “undisciplined lending practices,” stating that “[t]he World Bank undermines the transnational anti-corruption regime through its failure to carry out due diligence of project-implementing agencies when it advances loans to notoriously corrupt governments.”¹⁵⁷ He points out that the personal success of World Bank officials “depend[s] on the number of loans they approve”.¹⁵⁸ Further, “whether a loan is stolen should make little difference to the World Bank because of its ability to earn interest and even accelerate payment on that loan.”¹⁵⁹ Due to the lack of incentive to ensure loans are used for their intended purpose, Sarlo called for increased regulation of World Bank lending practices.

¹⁵³ *Ibid.*

¹⁵⁴ These forms can be accessed online: <www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework>.

¹⁵⁵ Richard L Cassin, “Compliance Alert: World Bank Adopts More Flexible and Transparent Procurement Reforms”, *The FCPA Blog* (22 July 2015), online: <www.fcpcablog.com/blog/2015/7/22/compliance-alert-world-bank-adopts-more-flexible-and-transpa.html>; Daniel Dudis, “World Bank Adopts Key Transparency International Goals in New Procurement Policies”, *Transparency International* (31 July 2015), online: <blog.transparency.org/2015/07/31/world-bank-adopts-key-transparency-international-goals-in-new-procurement-policies/>.

¹⁵⁶ Annalisa Leibold, “Chad: Corruption Is Real, the FCPA Not So Much”, *The FCPA Blog* (8 July 2015), online: <www.fcpcablog.com/blog/2015/7/8/chad-corruption-is-real-the-fcpa-not-so-much.html>.

¹⁵⁷ Paul Sarlo, “The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank’s Lending Practices” (2014) 45:4 *Geo J Intl L* 1293 at 1308.

¹⁵⁸ *Ibid* at 1309.

¹⁵⁹ *Ibid.*

6.1.4 WTO Agreement on Government Procurement (WTO-AGP)

The WTO-AGP¹⁶⁰ has the status of a binding international treaty among its 43 members.¹⁶¹ Although the primary objective of the WTO-AGP is to ensure free market access among State parties, it is relevant to procurement in that it contains provisions that require fairness and transparency in government procurement.¹⁶² For example, Article XVI.1 mandates that a procuring entity “promptly inform participating suppliers of the entity’s contract award decisions [...and], on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier’s tender.”¹⁶³ Article XVII.1 requires that, upon request, “a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender.”¹⁶⁴ However, The WTO-AGP applies only to “covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values.”¹⁶⁵ In the context of government construction contracts in Canada, the WTO-AGP applies to:

- listed central government entities procuring construction services in excess of \$8.5 million CAD;
- listed sub-central government entities (which do not include provincial legislatures or Crown corporations but do include provincial departments and ministries) procuring construction services in excess of \$8.5 million CAD; and
- all construction services identified in Division 51 of the United Nations Provisional Central Product Classification.¹⁶⁶

¹⁶⁰ *Agreement on Government Procurement*, 1915 UNTS 103 (being Annex 4(b) of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).

¹⁶¹ World Trade Organization, “Agreement on Government Procurement: Parties, Observers and Accessions”, online: <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>.

¹⁶² World Trade Organization, “Government Procurement: Agreement on Government Procurement”, online: <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.

¹⁶³ *Revised Agreement on Government Procurement*, Annex to the Protocol Amending the Agreement on Government Procurement (adopted on 30 March 2012) (GPA/113), online: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm>.

¹⁶⁴ *Ibid.*

¹⁶⁵ WTO, “Agreement on Government Procurement: Parties, Observers and Accessions”.

¹⁶⁶ World Trade Organization, “Agreement on Government Procurement: Coverage Schedules”, online: <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm>; World Trade Organization, “Thresholds in National Currencies (All Notifications by Canada)”, online: <<https://e-gpa.wto.org/en/ThresholdNotification?PartyId=216>>.

6.1.5 NAFTA

One of the goals of NAFTA is to provide Canada, the US and Mexico with access to one another's government procurement opportunities at the federal level.¹⁶⁷ Chapter 10 of NAFTA sets out requirements for tendering procedures with which the federal government of Canada must comply. The requirements of NAFTA focus mainly on free trade and fair competition, and typically do not apply to Canadian provinces or municipalities. NAFTA's requirements for tendering procedures apply only to construction services contracts in excess of CAD\$11.6 million where a government department or agency is contracting, or CAD\$14.3 million where a Crown corporation is contracting.¹⁶⁸

6.1.6 Comprehensive Economic and Trade Agreement (CETA)

Negotiations for the Comprehensive Economic and Trade Agreement (CETA)—Canada's new trade agreement with the European Union—began during the EU-Canada Summit in Prague on May 6, 2009 and ended on September 26, 2014 at the EU-Canada Summit in Ottawa where leaders released the completed text of the Agreement.¹⁶⁹ On October 30, 2016, the EU and Canada approved and signed the agreement.¹⁷⁰ The Government of Canada describes CETA as Canada's "most ambitious trade agreement, broader in scope and deeper in ambition than the historic NAFTA."¹⁷¹ The Government adds, "CETA covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers. CETA

¹⁶⁷ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994), online: NAFTA <www.naftanow.org/agreement/default_en.asp>.

¹⁶⁸ Government of Canada, "Trade Agreements: Thresholds Update", Contracting Policy Notice 2015-3 (30 December 2015), online: <www.tbs-sct.gc.ca/hgw-cgf/business-affaire/gcp-agc/notices-avis/2015/15-03-eng.asp>.

¹⁶⁹ Elfriede Bierbrauer, "Negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Concluded" (Brussels: European Parliament, Policy Department, Directorate-General for External Policies, 2014) at 4, online: <[www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO_IDA\(2014\)536410_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO_IDA(2014)536410_EN.pdf)>. See also Government of Canada, "Chronology of Events and Key Milestones", online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng>.

¹⁷⁰ The European Commission, "EU-Canada Summit: Newly Signed Trade Agreement Sets High Standards for Global Trade" (30 October 2016), online: <trade.ec.europa.eu/doclib/press/index.cfm?id=1569>.

¹⁷¹ Canada-European Union Comprehensive Economic and Trade Agreement [CETA], online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

addresses everything from tariffs to product standards, investment, professional certification and many other areas of activity.”¹⁷²

CETA still has to go through the stages of democratic oversight before it comes fully into force.¹⁷³ Canada’s federal Parliament must enact implementing legislation. This process has already begun: on October 31, 2016, Minister of International Trade Chrystia Freeland tabled the treaty and introduced implementing legislation, Bill C-30,¹⁷⁴ in the House of Commons.¹⁷⁵ Bill C-30 was enacted and received Royal Assent on May 16, 2017, and most of its provisions came into force on that date. A similar process of parliamentary approval and ratification must also occur in EU countries. Once Canada’s federal Parliament and parliaments in EU countries approve the agreement, CETA will fully come into force. Until that time, assent from the European Parliament would allow CETA to enter force provisionally.¹⁷⁶

Like NAFTA, the applicability of CETA to any given procurement will depend upon whether the procuring entity and goods or services being procured are designated under the agreement and whether the necessary monetary threshold is exceeded. However, CETA designates a much broader list of applicable entities than does NAFTA. CETA will apply to Canadian and EU suppliers bidding on procurements by federal, provincial and MASH¹⁷⁷ entities.¹⁷⁸ The applicability of CETA to Canada’s MASH sector is noteworthy and signifies a “changing dynamic” in public procurement.¹⁷⁹ Moreover, CETA’s chapter on government

¹⁷² Government of Canada, “Agreement Overview”, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/overview-aperçu.aspx?lang=eng>.

¹⁷³ The European Commission, “CETA Explained”, online: <ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>.

¹⁷⁴ Bill C-30, *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*, 1st Sess, 42nd Parl, 2016.

¹⁷⁵ Global Affairs Canada, Press Release, “International Trade Minister Introduces Legislation to Parliament to Implement CETA” (31 October 2016), online: <<https://www.canada.ca/en/global-affairs/news/2016/10/international-trade-minister-introduces-legislation-parliament-implement-ceta.html?wbdisable=true>>.

¹⁷⁶ Philip Blenkinsop, “CETA: EU-Canada Trade Deal Clears Legal Hurdle in EU Parliament”, *Global News* (23 November 2016), online: <globalnews.ca/news/3083618/ceta-eu-canada-trade-deal-clears-legal-hurdle-in-eu-parliament/>.

¹⁷⁷ MASH is the acronym used in procurement laws and practices involving “Municipalities, Academic institutions, Schools, and Hospitals”.

¹⁷⁸ CETA explicitly applies to municipalities, school boards, publicly funded academic institutions, health and social services entities, Crown corporations, mass transit by provinces, and 75% of procurements by public utilities: Brenda C Swick, “A New Era in Municipal Procurement: Canada-EU Comprehensive Economic and Trade Agreement” (McCarthy Tétrault LLP, presentation for Ontario Public Buyers Association, Thorold, Ontario, 17 November 2014) at 7, online: <[www.mccarthy.ca/pubs/New_Era_in_Municipal_Procurement_\(November_17_2014_at_OPBA\).pdf](http://www.mccarthy.ca/pubs/New_Era_in_Municipal_Procurement_(November_17_2014_at_OPBA).pdf)>.

¹⁷⁹ *Ibid.*

procurement is very detailed, including extensive sections on publication of procurement information and transparency in the procurement process.¹⁸⁰

CETA reflects the pressure on the federal government to open up the entire Canadian procurement market to international bidders. This pressure results from the recognition that significant sums of money are exchanged via procurement at the MASH level.¹⁸¹

Experts predict that under CETA, municipal procurements will become more competitive, scrutinized, and susceptible to challenge, and will more closely mirror the federal government procurement experience.¹⁸² One commentator suggested that under CETA municipalities and publicly funded organizations will lose some flexibility in the design and conduct of their procurements, as they will be subject to various statutory duties and an implied duty of fairness and good faith in carrying out their procurements where they might not otherwise have been.¹⁸³ That said, CETA will only apply to MASH sector construction procurement valued at CAD\$7.8 million or greater, a threshold that will not be met by most MASH sector contracts.¹⁸⁴

6.1.7 African Union Convention on Preventing and Combating Corruption

Article 11(2) of the AU Convention requires parties to establish mechanisms “to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights.”¹⁸⁵ This provision can be criticized as being too weak in comparison to the international community’s response to corruption in the procurement process. Article 11(3) requires state parties to adopt “other such measures as may be necessary to prevent companies from paying bribes to win tenders.”¹⁸⁶

¹⁸⁰ CETA, Chapter 19, online: Foreign Affairs, Trade and Development Canada <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/19.aspx?lang=eng>.

¹⁸¹ Swick (17 November 2014) at 3.

¹⁸² *Ibid*; Brenda C Swick, Leila Rafi & John Boscariol, “Update on Procurement Law in Canada”, McCarthy Tétrault LLP (21 January 2015) at 51, online: <www.mccarthy.ca/pubs/McCarthyTetrault_2015-01-21_Update_Procurement_Law_Canada_Presentation.pdf>.

¹⁸³ PatryLaw, “Public Procurement Law in Canada: An Overview” (29 February 2016), online: <https://patrylaw.ca/government-procurement-bidding-tendering/procurement-law-canada-overview/-_ednref10>.

¹⁸⁴ Swick (17 November 2014) at 9.

¹⁸⁵ *African Union Convention on Preventing and Combating Corruption* (adopted 11 July 2003), online: <https://www.legal-tools.org/uploads/tx_ltpdb/AfricanUnionConventiononPreventingandCombatingCorruption_11-07-2003_E_04.pdf>.

¹⁸⁶ *Ibid*.

6.1.8 UNCITRAL Model Law on Public Procurement

On July 1, 2011, the United Nations Commission on International Trade Law (UNCITRAL) published the UNCITRAL Model Law on Public Procurement (MLPP).¹⁸⁷ It has been designed as a tool for “modernizing and reforming procurement systems” and assisting countries in implementing legislation where none is currently in place.¹⁸⁸ It is an extensive, detailed model law (84 pages) and accompanied by a very detailed Guide (419 pages).¹⁸⁹

The objectives of the MLPP are outlined in the preamble:

- a) Achieving economy and efficiency;
- b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- c) Maximizing competition;
- d) Ensuring fair, equal and equitable treatment;
- e) Assuring integrity, fairness and public confidence in the procurement process; and
- f) Promoting transparency.¹⁹⁰

The MLPP was intended to apply to all types of procurement and requires no threshold amount for its application to transactions. The MLPP also provides guidance in applying procurement law to security and defence contracts. The MLPP sets out the minimum requirements and essential principles for effective procurement legislation:

- a) the applicable law, procurement regulations, and other relevant information are to be made publicly available (article 5);
- b) requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33–35) and ex post facto notice of the award of procurement contracts (article 23);
- c) items to be procured are to be described in accordance with article 10 (that is, objectively and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on an objective basis);

¹⁸⁷ *UNCITRAL Model Law on Public Procurement* (adopted 1 July 2011), online:

<www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>.

¹⁸⁸ United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (United Nations, 2014) at iii, online:

<www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid* at 3.

- d) requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, with the particular criteria that will determine whether or not suppliers or contractors are qualified communicated to all potential suppliers or contractors (articles 9 and 18);
- e) open tendering is the recommended procurement method and the use of any other procurement method must be objectively justified (article 28);
- f) other procurement methods should be available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialized items or services) with conditions for use of these procurement methods (articles 29–31);
- g) a requirement for standard procedures for the conduct of each procurement process (chapters III–VII);
- h) a requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7);
- i) a requirement for a mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22(2)); and
- j) mandatory challenge and appeal procedures if rules or procedures are breached (chapter VIII).¹⁹¹

The MLPP is a framework law and does not include all the regulations necessary for implementation. However, it does provide insight into some important aspects of procurement law and guidance on implementing effective procurement laws and regulations.

6.2 US Law and Procedures

The US procurement system is considered by some to be one of the most sophisticated and developed in the world.¹⁹² Even so, it is unable to prevent all corruption, as demonstrated by the case of a senior US Department of Defense acquisition official who pled guilty to criminal conspiracy regarding the negotiation of a US\$23 billion acquisition from Boeing.¹⁹³

¹⁹¹ *Ibid* at 14–15.

¹⁹² Glenn T Ware et al, “Corruption in Procurement” in Adam Graycar and Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011).

¹⁹³ *Ibid*.

US law on public procurement falls under the *Competition in Contracting Act* of 1984. The *Federal Acquisition Regulation* further details the rules of hosting and participating in public procurement. Although the Government Accountability Office (GAO) and the Court of Federal Claims have heard hundreds of protests under the Federal Acquisition Regulation, these cases have rarely resulted in a finding that there was improper motivation for deviating from the rules.

6.2.1 *Competition in Contracting Act*

The *Competition in Contracting Act* (CICA) was passed in 1984 to promote competition and reduce government costs of procurement.¹⁹⁴ CICA requires all procurements have a “full and open competition through the use of competitive procedures” (subject to some exceptions); the Act also places various requirements on all contracts over \$25,000.¹⁹⁵ CICA governs all procurement contracts that do not fall under more specific procurement legislation. Exceptions to CICA’s “full and open competition” requirements¹⁹⁶ include:

- 1) single source contracts for goods or services;
- 2) cases of unusual and compelling urgency;
- 3) the maintenance of expertise or certain capacity;
- 4) requirements under international agreements;
- 5) situations with express authorization by statute;
- 6) national security interests; and
- 7) cases in which the head of the agency determines the exception is necessary and notifies Congress in writing.¹⁹⁷

“Full and open competition” is fulfilled when “all responsible sources are permitted to submit sealed bids or competitive proposals.”¹⁹⁸

6.2.2 *Federal Acquisition Regulation*

The *Federal Acquisition Regulation* (FAR) took effect on April 1, 1984. Its purpose is to codify and publish uniform policies and procedures for all acquisitions by executive agencies.¹⁹⁹ The system is designed to efficiently deliver the product or service necessary to not only fulfill public policy objectives, but provide the best value while promoting the public’s trust.

¹⁹⁴ *Competition in Contracting Act*, 41 USC § 253 (1984).

¹⁹⁵ *Ibid.* However, requirements change based on the dollar value of the contract.

¹⁹⁶ For additional commentary on the “full and open competition” requirements, see generally Kate M Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements*, Congressional Research Service (30 June 2011), online: <<https://fas.org/sgp/crs/misc/R40516.pdf>>.

¹⁹⁷ *Competition in Contracting Act*, 41 USC § 253 (1984).

¹⁹⁸ 41 USC § 403(6) (2009).

¹⁹⁹ *Federal Acquisition Regulation*, 48 CFR § 1.101 (1983).

FAR sets out detailed requirements with which executive agencies must comply when procuring contractors for a specific project.

According to section 9.103 of *FAR*, the US government will only contract with “responsible contractors.” To be deemed “responsible,” contractors must meet a set of standards contained in section 9.104, including a “satisfactory record of integrity and business ethics.”²⁰⁰ Contractors that fail to meet the standard of “presently responsible” can be debarred or suspended from public procurement. Causes for debarment include convictions for fraud, bribery, embezzlement or “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”²⁰¹ *FAR* also includes a catch-all provision that facilitates debarment for “any other cause of so serious or compelling nature that it affects the present responsibility of a Government contractor.”²⁰² As pointed out by Barletta, causes for debarment might arise from conduct connected to contracts, or non-contractual conduct, such as environmental misdemeanours.²⁰³ Officials in charge of debarment have wide discretion and may consider mitigating factors or remedial measures implemented by the contractor.²⁰⁴ Debarment is government-wide and company-wide and generally lasts no more than three years.²⁰⁵

Suspensions are imposed pending investigations or legal proceedings when necessary to protect the Government’s interest. The imposition of a suspension must be based on “adequate evidence.”²⁰⁶ Causes for suspension are similar to causes for debarment, except only adequate evidence of the commission of an offence, rather than a conviction, is required.

Part 3.10 of *FAR* introduces the Contractor Code of Business Ethics and Conduct. Section 3.1002 states that contractors must operate “with the highest degree of honesty and integrity” and have a written code of business ethics and conduct, along with a compliance training program and internal controls system that will promote compliance with that code of conduct. Other requirements for various types of contracts are laid out in section 52.203-13.

To promote accountability in decision making, the GAO operates a bid protest system. The bid protest system allows parties, who believe a federal agency offering the tender has failed

²⁰⁰ *Ibid*, § 9.104(d).

²⁰¹ *Ibid*, § 9.406-2(a)(5).

²⁰² *Ibid*, § 9.406-2(c).

²⁰³ Thomas P Barletta, “Procurement Integrity and Supplier Debarment – A U.S. Perspective” (Address delivered at the Transparency International Canada Day of Dialogue, Toronto, 6 May 2015) [unpublished].

²⁰⁴ *Federal Acquisition Regulation*, 48 CFR § 9.406-1 (1983).

²⁰⁵ Barletta (6 May 2015).

²⁰⁶ *Federal Acquisition Regulation*, 48 CFR § 9.407-1(b)(1) (1983).

to comply with procurement laws and regulations on a specific bid, to file a protest with the GAO in order to have their complaint resolved expeditiously.²⁰⁷

6.3 UK Law and Procedures

On June 23, 2016, the UK held a referendum to decide whether it should leave the European Union.²⁰⁸ A majority of voters elected to leave the EU, an event commonly referred to as “Brexit.” The full implications of this decision have yet to be determined. For the UK to formally leave the EU, it must invoke Article 50 of the Lisbon Treaty, which provides that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements” and gives the parties two years to agree on the terms of the exit.²⁰⁹

The government’s assumption that it could trigger the Article 50 process without Parliament’s approval was challenged successfully in the UK High Court of Justice.²¹⁰ The High Court issued its ruling on November 11, 2016, concluding that the Secretary of State does not hold the power under the Crown’s prerogative to give notice of the UK’s intention to leave the EU. Rather, the High Court held, the matter must be put to a vote in both Houses of Parliament before Article 50 of the Lisbon Treaty can be triggered.²¹¹ The High Court’s decision was affirmed by the Supreme Court in January 2017.²¹² In March of 2017, however, Parliament passed a bill that allowed ministers to trigger Article 50.²¹³ On March 29, 2017, UK Prime Minister Theresa May triggered the exit process by sending a letter to EU Council President Donald Tusk. The two-year negotiation period will end on March 29, 2019 unless the remaining 27 EU member States agree to extend the deadline for talks.²¹⁴

It is difficult to predict what the impacts of Brexit will be on the UK’s procurement laws, especially since it is the first time in history that Article 50 has been triggered.²¹⁵ The UK will

²⁰⁷ US Government Accountability Office, “Bid Protests”, online: <www.gao.gov/legal/bid-protests>.

²⁰⁸ Alex Hunt & Brian Wheeler, “Brexit: All You Need to Know About the UK Leaving the EU”, *BBC News* (12 December 2016), online: <www.bbc.com/news/uk-politics-32810887>.

²⁰⁹ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* [2007] OJ C306/01. Article 50 came into force in 2009 after amendments were made to the Lisbon Treaty of 2007.

²¹⁰ Hunt & Wheeler (12 December 2016).

²¹¹ Alex Hunt & Brian Wheeler, “Brexit: All You Need to Know About the UK Leaving the EU”, *BBC News* (12 December 2016), online: <www.bbc.com/news/uk-politics-32810887>.

²¹² Hunt & Wheeler (12 December 2016).

²¹³ Anushka Asthana, Rowena Mason & Lisa O’Carroll, “Parliament passes Brexit bill and opens way to triggering article 50”, *The Guardian* (13 March 2017), online: <<https://www.theguardian.com/politics/2017/mar/13/brexit-vote-article-50-eu-citizens-rights-lords-mps>>.

²¹⁴ “‘No turning back’ on Brexit as Article 50 triggered”. *BBC News* (30 March 2017), online: <<http://www.bbc.com/news/uk-politics-39431428>>.

²¹⁵ Alex Hunt & Brian Wheeler, “Brexit: All You Need to Know About the UK Leaving the EU”, *BBC News* (12 December 2016), online: <www.bbc.com/news/uk-politics-32810887>.

have to decide how it will disentangle its own law from EU law. However, until the UK formally ceases to be a member of the EU, EU law will continue to apply in the UK. Moreover, the UK's exit from the EU will not generally affect the operation of policies that have been transposed into domestic law.

One law firm commenting on the potential impact of Brexit on the UK's procurement laws made the following observations:

Once it leaves the EU, the UK would no longer need to comply with the EU's public procurement rules and could in theory select UK bidders to a greater extent. However, as a non-EU country, the UK may find it difficult to complain about public procurement rules being applied "unfairly" against UK companies tendering for EU work. Ultimately, irrespective of any trading relationship that is negotiated with the EU, it is likely that the UK would have rules similar to the existing public procurement regime.²¹⁶

Another law firm explained the potential implications in the following terms:

Depending on the exit model and the future trading relationship agreed between the UK and the EU, many EU imposed regulations may at first blush appear to "fall away".

However, this overlooks the fact that many EU Regulations have either already been transposed into UK law, or stem from or are reflected in other public international law obligations (including WTO agreements and the UN conventions) which have been adopted and ratified by the UK.

These international obligations will continue in force even after the UK exits unless the UK takes further steps to repeal/secede from these international agreements.²¹⁷

UK procurement lawyers Smith and Benjamin added the following:

Whilst the EU Treaty and EU Procurement Directives would no longer apply in the UK [after the UK formally withdraws from the EU], an 'out' decision would have no impact on the validity of the UK legislation put in place to transpose those directives (i.e. the Public Contracts Regulations 2015 and the ... Utilities Contracts Regulations 2016 and Concession Contracts Regulations 2016). Instead, there is likely to be a drawn-out process of repeal and reform in sectors in which the UK has traditionally

²¹⁶ Linklaters LLP, "FAQs on the Impact of the UK's Vote to Leave the EU" (24 June 2016) at 3, online: <www.linklaters.com/pdfs/mkt/london/EU_Ref_Leave_Vote_FAQs.pdf>.

²¹⁷ Mills & Reeve LLP, "Brexit: How Will It Impact on UK Procurement and Construction Law?" (24 June 2016), online: <www.mills-reeve.com/brexit-how-will-it-impact-on-uk-procurement-and-construction-law/>.

been dissatisfied with the EU position. Wholesale reform of the public procurement regime is unlikely to be top of the government's list.²¹⁸

Others observed that the UK is unlikely to dismantle its domestic legislation implementing the *EU Directive*, discussed below, since the UK was influential in the drafting of the *Directive*.²¹⁹

Against this backdrop the UK has at present two similar sets of regulations that govern public procurement: one for England, Wales, and Northern Ireland, and the other for Scotland. These regulations were enacted to ensure the UK's compliance with EU requirements, discussed in the next section. These regulations apply if the following pre-conditions are met:

- 1) **The body doing the buying is a contracting authority.** The definition of "contracting authority" is wide and includes central government, local authorities, associations formed by one or more contracting authorities, and other bodies governed by public law;
- 2) **The contract is for public works, public services, or public supplies.** Sometimes the contract will be a mixed contract (e.g., the supply and maintenance of computers). Where it is, a contracting authority must determine which element (e.g., the supply element or the service element) is the predominant element and, therefore, which set of rules will apply. This can be important to get right as the rules vary slightly depending on the type of contract (e.g., lower financial thresholds apply to services and supplies contracts than to works contracts); and
- 3) **The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold.** The rules expressly prohibit deliberately splitting contracts to bring them below the thresholds. These thresholds are dealt with under the 2014 *EU Directive*, discussed below.

6.3.1 EU Directive

The *EU Directive on Public Procurement* (the *EU Directive*)²²⁰ is a regulatory tool that promotes free trade and fair competition for procurement contracts throughout the European Union. It requires EU members to implement a regulatory regime that, in accordance with the *EU Directive*, promotes transparency, equal treatment, non-discrimination, mutual recognition,

²¹⁸ Ruth Smith & Tom Benjamin, "Plus Ça Change ... 5 Reasons Why Brexit Is Unlikely to Spell the End of Procurement Regulation in the UK", Mills & Reeve LLP (24 February 2016), online: <www.procurementportal.com/blog/blog.aspx?entry=480>.

²¹⁹ Colin Cram, "The Impact of Brexit on UK's £200bn Public Procurement Spend", *The Guardian* (13 June 2016), online: <<https://www.theguardian.com/public-leaders-network/2016/jun/13/brexit-uk-200bn-public-procurement-eu-rules>>.

²²⁰ EC, *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance* [2014] OJ L 94/65, online: <eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32014L0024>.

and proportionality.²²¹ In doing so, it helps create uniform law across the EU and also lowers barriers for companies hoping to gain contracts in other EU countries.

The *EU Directive* requires that the regime apply to public procurement contracts that are of greater value than, pre-VAT, €5,186,000 for public works contracts and €134,000 for public supply and services contracts awarded by central governments, €207,000 for public supply and services contracts awarded by sub-central governments, and €750,000 for specific public service contracts.²²² These thresholds are based on the *WTO Agreement on Government Procurement*. The *EU Directive* made several changes to previous public procurement provisions. Besides trying to adapt the rules to maximize efficiency and competition, the *Directive* strives to increase the number of contracts awarded to Small and Medium Sized Enterprises (SMEs); allow public purchasers to consider social policy in the tender they choose (such as the environmental impact of each tender); and increase measures to reduce conflicts of interest, favouritism, and corruption.²²³

6.3.2 *Public Contracts Regulations 2015*

The *Public Contracts Regulations 2015 (PCR)*²²⁴ introduced in Parliament on February 5, 2015 apply to contracts offered by Contracting Authorities in England, Wales, and Northern Ireland.²²⁵ The majority of the *PCR* came into force on February 26, 2015; however, certain provisions, such as the requirement to advertise all offers of procurement online, will not come into force until a later date as set out in section 1 of the regulation (no later than October 18, 2018).

The *PCR* repealed and replaced the *Public Contracts Regulations 2006* and was drafted in response to the updated requirements in the *EU Directive on Public Procurement*. The principles of procurement are set out in section 18: treating economic operators equally,

²²¹ *Ibid*, Article 18(2).

²²² *Ibid*, Article 4.

²²³ EC, *Public Procurement Reform: Fact Sheet No 1: General Overview*, online: ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-01-overview_en.pdf.

²²⁴ *Public Contracts Regulations 2015*, SI 2015/102.

²²⁵ The *Public Contracts (Scotland) Regulations 2015 (PCRS)* came into force on April 18, 2016. These regulations transposed the 2014 *EU Directive on Public Procurement* into domestic law in Scotland. Although broadly similar to the English *PCR*, the *PCRS* differ from its English counterpart in some respects. The reason for this discrepancy is that the *EU Directive* contains a number of mandatory provisions to which all member states must adhere, but also gives member states a degree of discretion on how to implement certain provisions. The Scottish government has taken a different approach to certain issues than that taken by policy makers in England and Wales. See Claire Mills, "Procurement Reform in Scotland: Update, January 2016", BTO Solicitors (15 January 2016), online: www.bto.co.uk/blog/procurement-reform-in-scotland---update-january-2016.aspx. Scotland introduced further reforms to its public procurement regime through the *Procurement (Scotland) Regulations 2016*, which also came into force on April 18, 2016.

without discrimination and in a transparent manner.²²⁶ The *PCR* also provides that Contracting Authorities are not to design a procurement process to artificially narrow competition or intentionally exclude it from certain provisions of the *PCR*.²²⁷ The *PCR* imposes a duty on the Contracting Authority in relation to economic operators, and if this duty is breached and the breach causes loss, an economic operator can bring a claim under the *PCR*.²²⁸ The *PCR* specifies the remedies that may be sought by economic operators. There are exclusions as to when the *PCR* applies, such as where the authority is buying for the defence and security sector, in which case the *Defence and Security Public Contracts Regulations 2011* may cover the situation.²²⁹

The *PCR* strives to improve the public procurement environment and make it easier for more companies to compete in procurement offers. Changes to the *PCR* include reducing red tape, opening the market to SMEs, clarifying that poor performance by a bidder will lead to that bidder's exclusion from future offers, allowing the creation of innovation partnerships, introducing a requirement for contracting authorities to demand explanation for abnormally low tenders, and introducing a requirement that the bid be rejected if it is low as a result of breaches to environmental, social or labour laws. It is thought that the changes to the *PCR* will allow for more flexibility and simplicity in procurement law.

6.3.3 *Public Services (Social Value) Act 2012*

The *Public Services (Social Value) Act 2012 (PSA)*²³⁰ received royal assent on March 8, 2012 and came into force on January 31, 2013. It creates a statutory requirement for public authorities in England and Wales "to have regard to economic, social and environmental well-being in connection with public services contracts."²³¹ The *PSA* applies only to public service contracts, not public works or supplies contracts. A 2014 review of the *PSA* found that, although implementation was under way, there were struggles in defining the measurement technique of social value and lack of clarity on what should be measured. These issues made it difficult to compare bids objectively.²³² In conducting this review, the government provided some guidance for public authorities on how to comply with the *PSA* and include *PSA* considerations in the tendering process. The *PSA* may be seen as a toothless initiative as there are no penalties within the *Act* for non-compliance. However, the *PSA* does provide for holistic consideration of the environmental, societal and economic impacts of tender

²²⁶ *Public Contracts Regulations 2015*, SI 2015/102, s 18.

²²⁷ *Ibid.*

²²⁸ *Ibid.*, s 90.

²²⁹ UK, "Guidance: Public Procurement Policy" (6 October 2016), online: <<https://www.gov.uk/guidance/public-sector-procurement-policy-public-contracts-regulations-2015>>.

²³⁰ *Public Services (Social Value) Act 2012* (UK), 2012, c 3.

²³¹ *Ibid.*

²³² UK, Cabinet Office, *Social Value Act Review* (Cabinet Office, 2015) at 11, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf>.

submissions, rather than limiting consideration to the actual cost of the initial procurement project.

6.4 Canadian Law and Procedures

This section on Canadian law is restricted to the public procurement policy framework at the federal level. These federal laws and policies aim to not only ensure good governance and enforce the rule of law, but also to ensure compliance with Canada's international treaty obligations. As Canada is a federal state, federal laws and policies generally govern federal public procurement only. Any reference to "sub-federal procurement" refers to procurement that occurs below the federal level (i.e., provincial, municipal or MASH). Describing procurement laws and procedures only at the federal government level is a serious limitation. Federal procurement laws and procedures are in general far more detailed and stringent than most provincial and municipal procurement regimes. Improvement of these latter regimes is a pressing need in Canada.

6.4.1 Canada-US Agreement on Government Procurement (CUSAGP)

The CUSAGP came into effect on February 16, 2010.²³³ Its primary goal, similar to NAFTA and the WTO-AGP, is to grant Canada and the US access to each other's public infrastructure industry.²³⁴ However, CUSAGP is significant in that it represents the extension of sub-federal procurement commitments, something Canada would not agree to under the WTO.²³⁵ Unlike the US, Canada still has not extended access to sub-federal procurement to other WTO signatories.²³⁶ The Agreement provides an exemption to "Buy American" provisions for Canadian bidders and guarantees American access to provincial markets and contracts, with the exception of Nunavut.²³⁷

The core principles of CUSAGP address non-discrimination and transparency. For the purposes of transparency, entities subject to the Agreement are obligated to make their procurement policies readily accessible and to use competitive tendering processes except

²³³ *Agreement Between the Government of Canada and the Government of the United States of American on Government Procurement*, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/agreement-accord.aspx?lang=eng>.

²³⁴ For an overview of the CUSAGP, see Global Affairs Canada, "Canada-U.S. Agreement on Government Procurement", online: <tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/agreement-accord.aspx?lang=eng>.

²³⁵ Parliament of Canada, *Report on the Canada-US Agreement on Government Procurement*, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4416059&Mode=1&Parl=40&Ses=3&File=18&Language=E>>.

²³⁶ *Ibid.*

²³⁷ Global Affairs Canada, "Canada-U.S. Agreement on Government Procurement", online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng/>>.

in certain circumstances.²³⁸ The exceptions cover the typical scenarios in which competitive tenders are not necessary, such as in the event of an emergency.

In Canada, the CUSAGP applies to procurement for construction services²³⁹ in the provinces where the value of the services is greater than or equal to CAD\$5 million.²⁴⁰ For Crown corporations and municipalities, it applies to contracts valued at CAD\$8.5 million or more.²⁴¹ Relatively few municipal contracts meet this monetary threshold.

6.4.2 Agreement on Internal Trade (AIT)

The AIT is an intergovernmental trade agreement that came into force in 1995 and has been signed by all provinces and territories except Nunavut.²⁴² Its purpose is “to foster improved interprovincial trade by addressing obstacles to the free movement of persons, goods, services and investments within Canada.”²⁴³ Chapter 5 of the AIT sets out procurement rules for entities in all signatory provinces and territories. AIT applies to purchase of goods contracts over \$25,000, purchase of services contracts over \$100,000 and purchase of construction contracts over \$100,000. For the AIT to apply to purchases by municipalities, the province must subscribe to the MASH Annex. The MASH Annex applies to construction procurement where the value is in excess of \$250,000.²⁴⁴

Under Chapter 5.P.5 of the AIT, each province is obligated to establish standard terms for tender documents and standardized procedures for complaint processes used by entities covered by the MASH Annex. The goal is to have these standard terms and procedures harmonized across the provinces.

The MASH Annex applies principles of non-discrimination, transparency and fair acquisition to MASH procurement. However, the anti-corruption provisions are basic and present a low threshold for compliance: discriminatory practices are not permitted (subject

²³⁸ *Agreement Between the Government of Canada and the Government of the United States of American on Government Procurement*, Appendix C, Part A, ss 7–9, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/agreement-accord.aspx?lang=eng>>.

²³⁹ A “construction services” contract is defined under the agreement as “a contract which has as its objective the realization by whatever means of civil or building works”: *ibid*, Annex 5. Procurement in this context is defined as “contractual transactions to acquire property or services for the direct benefit or use of the government”: *ibid*.

²⁴⁰ *Ibid*, Annex 2.

²⁴¹ *Ibid*, Appendix C, Part B. All municipalities and Crown corporations in BC are subject to the Agreement, though there is a list of Ontario ministries, agencies, and municipalities that are not covered by the Agreement.

²⁴² *Agreement on Internal Trade (Consolidated Version)* (2015), online: <www.ait-aci.ca/wp-content/uploads/2015/12/Consolidated-with-14th-Protocol-final-draft.pdf>.

²⁴³ Internal Trade Secretariat, “Overview of the Agreement on Internal Trade”, online: <www.ait-aci.ca/overview-of-the-agreement/>.

²⁴⁴ *Ibid*, Annex 502.4.

to exceptions),²⁴⁵ provincial and MASH entities must make their procurement laws and procedures accessible,²⁴⁶ and procurements within the ambit of AIT must occur via competitive tendering process (subject to exceptions).²⁴⁷ Appendix C lists circumstances for exclusions, including emergencies and confidentiality, and Appendix D outlines circumstances in which sole supplier procurement is appropriate. Section F provides a broad exception to the non-discrimination provisions where a “legitimate objective” can be established.²⁴⁸ The MASH Annex is also subject to Article 1600 of the AIT, which means that MASH sector procurement is subject to a provincial Committee on Internal Trade. Article 1600 obligates each province to establish a Committee on Internal Trade that supervises the implementation of the AIT, assists in dispute resolution arising out of the application of the AIT, and considers other matters relevant to the operation of the AIT. The non-judicial complaint process facilitated by the committees must be documented, and the provinces are obligated to attempt to resolve complaints.²⁴⁹ Where the complaints fail to be resolved, they may be referred to an expert panel.²⁵⁰

Many provincial entities have not yet established the complaint procedures required under the AIT, and it is unclear when these procedures will be established given that there are no concrete consequences for failing to do so.²⁵¹ As stated in a report prepared for the Certified General Accountants Association of Canada (which has since been integrated into the Chartered Professional Accountants of Canada organization), “the dispute resolution provisions, which should be the glue of the [AIT], providing its integrity and credibility, are slow, complicated, expensive and apparently not respected by all governments.”²⁵² This means that the MASH Annex to the AIT is, in many circumstances, toothless.

6.4.3 *Criminal Code*

Public procurement is also regulated or limited by a number of *Criminal Code* offences, including bribery of officers,²⁵³ frauds on the government,²⁵⁴ breach of trust of a public officer,²⁵⁵ municipal corruption,²⁵⁶ fraudulent disposal of goods on which money has been

²⁴⁵ *Ibid*, Article 504.

²⁴⁶ *Ibid*, Article 506.

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid*, Article 404 (definition of “legitimate objective”).

²⁴⁹ *Ibid*, Article 513.

²⁵⁰ *Ibid*.

²⁵¹ Marilyn Brown, “Building a Bid Dispute Protocol: Complaint Procedures under Trade Treaties” in Paul Emanuelli, ed, *Accelerating the Tender Cycle* (Northern Standard, 2012).

²⁵² Robert H Knox, “Canada’s Agreement on Internal Trade: It Can Work If We Want It To” (Report prepared for the Certified General Accountants Association of Canada, April 2001) at 3.

²⁵³ *Criminal Code*, RSC 1985, c. C-46, s 120.

²⁵⁴ *Ibid*, s 121.

²⁵⁵ *Ibid*, s 122.

²⁵⁶ *Ibid*, s 123.

advanced,²⁵⁷ extortion,²⁵⁸ and secret commissions.²⁵⁹ These offences are briefly described in Chapter 2, Section 2.5. Sections 121(1)(f) and 121(2) of the *Criminal Code* are specific offences in respect to federal and provincial procurement but do not cover municipal procurement offences. At the time of writing, these *Criminal Code* sections have not been used to prosecute unlawful procurement actions. Instead, procurement offences are prosecuted under the fraud and breach of trust offences in the *Criminal Code*, or the offence of “bid-rigging” under s. 47 of the *Competition Act*²⁶⁰ (punishable by fine and/or a maximum of 14 years’ imprisonment).

6.4.4 Overview of the Federal Policy Framework and Integrity Provisions

The policy framework for federal public procurement is set out in the *Financial Administration Act*²⁶¹ (and subordinate Government Contracts Regulations), the *Federal Accountability Act*,²⁶² the *Auditor General Act*,²⁶³ and the *Department of Public Works and Government Services Act*.²⁶⁴ Stobo and Leschinsky from the Canadian law firm Borden Ladner Gervais explain:

The [*Financial Administration Act*] provides the legal framework for the collection and expenditure of public funds. The Government Contracts Regulations, which were enacted pursuant to the *Financial Administration Act*, also provide the conditions for entering into a contract and the general requirements for the acquisition of goods and services.

Within the scope of this broad framework, the Treasury Board of Canada (“Treasury Board”) has been delegated overall responsibility for establishing general expenditure policies as they pertain to the federal procurement process. In addition to setting general principles of contracting, the Treasury Board is also responsible for approving contracts entered into by federal contracting agencies when such contracts exceed certain dollar-value thresholds as established from time to time by the Treasury Board.

²⁵⁷ *Ibid*, s 389.

²⁵⁸ *Ibid*, s 346.

²⁵⁹ *Ibid*, s 426.

²⁶⁰ RSC 1985, c C-34.

²⁶¹ *Financial Administration Act*, RSC 1985, c F-11.

²⁶² *Federal Accountability Act*, SC 2006, c 9, ss 308, 301, 306. This Act was largely the government’s response to the Sponsorship Scandal and the Gomery Commission’s Report that investigated the scandal: Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Government of Canada, 2006), online:

<www.parl.gc.ca/Content/LOP/researchpublications/prb0560-e.htm>. See also Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report* (Government of Canada, 2005), online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm>.

²⁶³ *Auditor General Act*, RSC 1985, c A-17.

²⁶⁴ *Department of Public Works and Government Services Act*, SC 1996, c 16.

[Public Works and Government Services Canada (PWGSC)] ... is the principal purchasing agent of the federal government of Canada and is responsible for providing procurement sources for the majority of federal departments. The statutory basis and administrative framework of PWGSC is established by the *Department of Public Works and Government Services Act*.²⁶⁵

On July 3, 2015, PWGSC put in place a new “Integrity Regime” which replaced the previous “Integrity Framework.”²⁶⁶ The new Integrity Regime emphasizes the importance of fostering ethical business practices and reducing the risk of Canada’s entering into contracts with suppliers convicted of an offence linked to unethical business conduct. On its website, PWGSC describes the basic structure of the new Integrity Framework and its application:

The regime is applied across government through agreements between [PWGSC] and other federal departments and agencies.

The regime applies to:

- goods, services and construction contracts, subcontracts and real property agreements with a transaction value over \$10,000
- contracts that:
 - are issued by a federal department or agency listed in schedule I, I.1 or II of the Federal Administration Act
 - contain provisions of the Ineligibility and Suspension Policy

It does not apply to contracts and real property agreements below \$10,000. It also does not apply to transfer payments.

...

The regime is made up of three parts:

1. Ineligibility and Suspension Policy – sets out when and how a supplier may be declared ineligible or suspended from doing business with the government

²⁶⁵ Gerry Stobo & Derek Leschinsky, *Pocketbook on the Canadian Public Procurement Regime* (Borden Ladner Gervais, 2009) at 18, online: <blg.com/en/News-And-Publications/documents/publication_1799.pdf>. See also the following three publications by Paul Emanuelli: *Government Procurement* (Lexis-Nexis, 2012), *Accelerating the Tendering Cycle: A Legal Due Diligence Guide* (Northern Standard, 2012), and *The Laws of Precision Drafting: A Handbook for Tenders and RFPs* (Northern Standard Publishing, 2009). See also Robert C Worthington, *Desktop Guide to Procurement Law* (LexisNexis Canada, 2013).

²⁶⁶ See Public Works and Government Services Canada, “About the Integrity Regime”, online: <www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>. See also John W Boscariol & Robert A Glasgow, “Canada Implements New Integrity Regime for Public Procurement”, McCarthy Tétrault LLP (6 July 2015), online: <www.mccarthy.ca/article_detail.aspx?id=7126>.

2. Integrity directives – provide formal instructions to the federal departments and agencies that follow the policy
3. Integrity provisions – clauses that incorporate the policy into solicitations and the resulting contracts and real property agreements

...

These are the main reasons why a supplier will or may be ineligible to do business with the government. ...

- The supplier or any of its affiliates have been convicted of certain offences under the *Criminal Code* or under these acts:
 - *Competition Act*
 - *Controlled Drugs and Substance Act*
 - *Corruption of Foreign Officials Act*
 - *Excise Tax Act*
 - *Financial Administration Act*
 - *Income Tax Act*
 - *Lobbying Act*
- The supplier entered into a subcontract with an ineligible supplier
- The supplier provided a false or misleading certification or declaration to Public Services and Procurement Canada
- The supplier breached any term or condition of an administrative agreement under the policy²⁶⁷

The following are the key features of the Integrity Regime:

- 1) a supplier convicted of a listed offence in Canada or abroad will remain ineligible for a period of ten years to enter into a procurement contract with the federal government;
- 2) a supplier can apply to have their ineligibility period reduced by up to five years if it addresses the causes of the conduct that led to its ineligibility;
- 3) a supplier will no longer be automatically penalized for the actions of an affiliate in which it had no involvement, which was the case under the previous Integrity Framework;
- 4) new tools are provided such as independent expert third-party assessments and administrative agreements that will specify required corrective actions and ensure their effectiveness;

²⁶⁷ Public Works and Government Services Canada, "Government of Canada's Integrity Regime", online: <www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>.

- 5) the government is given the ability to suspend a supplier for up to 18 months if it has been charged with a listed offence or has admitted guilt; and
- 6) the Integrity Provisions also apply to the subcontractors of winning bidders.²⁶⁸

More information on the Integrity Regime, including further public consultations on amending it—and in particular, the role of debarment within the Integrity Regime—can be found in Chapter 7, Section 8.6. At the end of Section 8.6, there is also a discussion of the Canadian government's most recent discussions on altering the Integrity Regime, and in particular the rules on suspensions and debarments.

Part 5 of the *Federal Accountability Act* addresses public procurement and amends the *Auditor General Act*, the *Department of Public Works and Services Act* and the *Financial Administration Act*. It expands the class of funding recipients into which the Auditor General may inquire as to the use of funds under the *Auditor General Act* and provides for the appointment and mandate of a Procurement Auditor under the *Department of Public Works and Services Act*. The *Financial Administration Act* was amended to reflect a government commitment to fairness, openness and transparency in government contract bidding, as well as to provide a power to implement deemed anti-corruption clauses in government contracts.

6.4.5 Quebec's Solution to Public Procurement Corruption: Is It Enough?

The issue of corruption in Quebec's construction sector was thrust into the spotlight in 2009 after reports revealed widespread bid-rigging and collusion, causing public outrage. The Liberal Party, led by Premier Jean Charest, was in power at the time. As mentioned in Section 1.3, Charest, after some stonewalling, appointed the Charbonneau Commission to conduct a public inquiry into corruption in the awarding and management of public contracts in the province's construction industry. The Commission's report can be accessed online (though the full report is available only in French).²⁶⁹ Evidence at the public inquiry revealed a thick web of corruption in the construction sector at the provincial and municipal level and a connection between this corruption and political party and election financing. The evidence also revealed that organized crime had infiltrated Quebec's construction industry.

In Quebec's 2012 elections, the Parti Québécois (PQ) under Pauline Marois was elected. Anxious to demonstrate the difference between the new government and the old, the PQ's first bill, put together in about six weeks, was the *Integrity of Public Contracts Act*.²⁷⁰ The

²⁶⁸ Public Works and Government Services Canada, "Backgrounder on the New Government-Wide Integrity Regime", online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-backgrounder-eng.html>>.

²⁶⁹ France Charbonneau, "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction" (November 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>. The English translation of the recommendations can be found online at <https://icclr.law.ubc.ca/wp-content/uploads/2017/06/9503929_001_EN_Rapport_final_CEIC_Tome3-1.pdf>.

²⁷⁰ Bill 1, *Loi sur l'intégrité en matière de contrats public* [*Integrity in Public Contracts Act*], 40th Legis, 1st Sess, Quebec (SQ 2012, c 25) (received assent and entered into force December 7, 2012).

central feature of Bill 1 was a new system of pre-authorization for companies involved in public procurement. Under the provisions of Bill 1, companies must obtain a certificate of integrity from the Autorité des marchés financiers (AMF), Quebec's securities markets regulator, before entering into construction and service contracts or subcontracts involving expenditures of CAD\$5 million or more, *Ville de Montréal* contracts covered by Orders in Council and certain public-private partnership contracts.²⁷¹ Beginning November 2015, the threshold for pre-authorization for public service contracts was lowered to CAD\$1 million, and the Quebec government intends to eventually lower the threshold to CAD\$100,000 for all public contracts (except those in the City of Montreal, which are subject to different thresholds).²⁷² The certificate will be automatically denied if any of a set of objective criteria are not met.²⁷³ The decision also depends on subjective criteria, as the AMF has discretion to deny applications "if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract."²⁷⁴ The legislation provides some potentially relevant factors in making this determination. As pointed out by Steele, this provision is "startlingly subjective."²⁷⁵

Steele notes that there is "no obvious precedent" for these provisions in any other jurisdiction.²⁷⁶ Looking at the legislative debates, no reference was made to other anti-corruption precedents, such as that of New York City. Based on New York's experiences, Steele argues that there is "serious doubt whether Bill 1 represents a sustainable anti-corruption agenda."²⁷⁷ New York City experienced a similar corruption scandal in its construction sector in the 1980s, but has since instituted successful anti-corruption measures. Although New York's system includes a process of pre-authorization, this measure is combined with other reforms, such as a strengthened Department of Investigations and independent monitors for contract administration. In 2014, a witness invited to the Charbonneau Commission from New York indicated that pre-authorization is only a small

²⁷¹ Louis Letellier, "Application of An Act Respecting Contracting by Public Bodies" (Address delivered at the Transparency International Canada 5th Annual Day of Dialogue, Toronto, 6 May 2015) [unpublished].

²⁷² Linda Gyulai, "More Contract Bidders to Be Vetted under Provincial Decree", *The Montreal Gazette* (11 June 2015), online: <montrealgazette.com/news/local-news/more-contract-bidders-to-be-vetted-under-provincial-decree>.

²⁷³ *An Act Respecting Contracting by Public Bodies*, CQLR 2012, c C-65.1, s 21.26. The objective criteria in s. 21.26 involve previous convictions for various offences. However, Bill 26 (enacted in April 2015) amended the *Act* by describing two situations in which the AMF need not automatically refuse to issue a certificate even though the objective criteria in s. 21.26 are met. See Bill 26, *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, 1st Sess, 41st Leg, Quebec, 2014, c 6, cl 26 (assented to 1 April 2015).

²⁷⁴ *An Act Respecting Contracting by Public Bodies*, CQLR 2012, c C-65.1, s 21.27.

²⁷⁵ Steele (2015) at 79.

²⁷⁶ *Ibid* at 81.

²⁷⁷ *Ibid* at 117.

part of a successful anti-corruption system, adding that pre-authorization would be ineffective on its own or would even increase costs by reducing the pool of eligible bidders.²⁷⁸

However, New York's experience was not considered in the legislative debates. The debates also did not reference the international and national anti-corruption framework or anti-corruption literature. In addition, Steele criticizes the fact that "the Bill 1 debate is devoid of any real diagnosis of why or where the corruption is occurring."²⁷⁹ Other issues that were not properly addressed include the subjectivity of the proposed provisions and the AMF's lack of resources to handle the large volume of verifications in issuing certificates of integrity.

Because of these gaps in the debate, Steele argues that Quebec's lawmakers had almost no objective evidence to support a belief that their anti-corruption legislation would work to stem corruption.²⁸⁰ Yet no one opposed the bill. He suggests that the public outcry pushed legislators to simply "do something, and do it quickly," therefore focusing efforts on "building an edifice that sounds like it *might* work to stem corruption, rather than examining the evidence, in the literature and precedents from around the world, for what was *likely* to work."²⁸¹ While public outcry was placated, Steele suggests that, in reality, Bill 1 has had "an almost entirely nominal effect."²⁸²

6.4.6 Office of the Procurement Ombudsman

The Government of Canada has put in place a Procurement Ombudsperson.²⁸³ As set out in subsection 22.1(3) of the *Department of Public Works and Government Services Act*, the mandate of the Procurement Ombudsman is to:

²⁷⁸ *Ibid* at 107–08.

²⁷⁹ *Ibid* at 102.

²⁸⁰ *Ibid* at 114.

²⁸¹ *Ibid* at 116 [emphasis in original].

²⁸² *Ibid* at 118. As of June 2015, 1,300 companies have been approved by the AMF and six or seven have been rejected. See Gyulai, (11 June 2015). SNC-Lavalin received approval to bid on public contracts in Quebec in February 2014: "SNC-Lavalin, WSP Green-Lit to Bid on Public Contracts in Quebec" *CBC News* (5 February 2014), online: <www.cbc.ca/news/canada/montreal/snc-lavalin-wsp-green-lit-to-bid-on-public-contracts-in-quebec-1.2524363>. For more on the realities of Bill 1 for companies, see Linda Gyulai, "Anti-Corruption Legislation Creates Niche Market for Private-Eye and Accounting Firms", *The Montreal Gazette* (17 July 2014), online: <montrealgazette.com/news/local-news/anti-corruption-legislation-creates-niche-market-for-private-eye-and-accounting-firms>. For the first decision on the legality of the AMF's refusal of authorization, see 9129-2201 *Québec inc c Autorité des marchés financiers*, 2014 QCCS 2070, leave to appeal to QCCA ref'd 2014 QCCA 1383.

²⁸³ Office of the Procurement Ombudsman, "Frequently Asked Questions", online: <<http://opo.boa.gc.ca/faq-eng.html>>. An ombudsman is an "independent, objective investigator of people's complaints against government and/or private sector organizations": Office of the Procurement Ombudsman, *Annual Report 2015–16* at 6. The Procurement Ombudsman is one of 14 ombudsmen for Canadian federal organizations.

- a) review the practices of federal departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;
- b) review any complaint respecting the award of a contract for the acquisition of goods below the value of \$25,000 and services below the value of \$100,000 where the criteria of Canada's Agreement on Internal Trade would apply;
- c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department, regardless of dollar value; and
- d) ensure that an alternative dispute resolution process is provided, if both parties to the contract agree to participate.²⁸⁴

Current Procurement Ombudsman Lorenzo Ieraci has stated that the purpose of the Office of the Procurement Ombudsman is to “bridge gaps that sometimes materialize between Canadian suppliers and federal organizations.”²⁸⁵ Its objective is to promote fairness, openness, and transparency in federal government procurement. A primary function of the Procurement Ombudsman is to review the procurement practices of departments, including PWGSC, and publicly report on the results. In order to ensure its independence in carrying out this duty, the Procurement Ombudsman operates at arm’s length from PWGSC.

The Office of the Procurement Ombudsman:

- works with suppliers and federal departments to clarify and address procurement issues;
- helps preserve the integrity of the federal procurement process by reviewing complaints from suppliers about the award or administration of a contract and making balanced recommendations;
- helps facilitate the resolution of contract disputes through alternative dispute resolution;
- reviews procurement practices in one or across a number of federal departments where recurring or systemic procurement issues are present;
- makes recommendations to strengthen fairness, openness, and transparency in federal procurement practices; and
- shares information on effective practices identified in the federal government and other jurisdictions to highlight leadership and reinforce positive initiatives in the field of procurement.²⁸⁶

²⁸⁴ *Department of Public Works and Government Services Act*, SC 1996, c 16.

²⁸⁵ Office of the Procurement Ombudsman, *Annual Report 2015–16* at 3.

²⁸⁶ Office of the Procurement Ombudsman, “Frequently Asked Questions”.

7. EVALUATION OF PROCUREMENT LAWS AND PROCEDURES

7.1 OECD Review of Country Compliance

The OECD established the OECD Working Group on Bribery (Working Group), a peer-monitoring group, to evaluate each country's performance in implementing the OECD Anti-Bribery Convention. Phase 1 evaluated the country's legislation, phase 2 evaluated whether the country was applying their legislation and phase 3 evaluated the country's enforcement of the Convention. In each phase, the Working Group provided recommendations for the country to improve their compliance. The Working Group then published a follow-up on the recommendations of each phase to evaluate whether the country had implemented the recommendations.²⁸⁷

7.1.1 US Law and Procedure

The Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the US did not criticize the US's implementation of the Convention in respect of its public procurement regime. However, it did note that the US rarely chose to debar companies that were convicted of bribery of a foreign public official even though American laws provided that companies could be debarred from federal contracts for up to three years for convictions under domestic and foreign anti-bribery laws. Recommendation 4 suggested debarments be applied equally to companies convicted of domestic and foreign bribery.²⁸⁸

The Working Group's 2012 follow-up for the US described the actions taken to implement the OECD's recommendation on debarment. The follow-up report confirmed that there is a statutory mechanism for the debarment of persons convicted of violations of the *Arms Export Control Act*.²⁸⁹ In addition, the report noted that although the *FCPA* does not impose mandatory statutory debarment, debarment was usually the result of indictment and/or conviction.²⁹⁰

²⁸⁷ For more information on the OECD monitoring process see OECD, "Country Monitoring of the OECD Anti-Bribery Convention", online: <www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

²⁸⁸ OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (2010), online: <www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf>.

²⁸⁹ *Arms Export Control Act of 1976* (Title II of Pub L 94-329, 90 Stat 729, enacted June 30, 1976, codified at 22 USC ch 39).

²⁹⁰ OECD, Working Group on Bribery, *United States: Follow-Up to the Phase 3 Report and Recommendations* (2012) at 13, online: <www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>.

7.1.2 UK Law and Procedure

The Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the UK advanced two main criticisms, contained in recommendations 3 and 6, of the UK's procurement regime. Recommendation 3 called for the UK to remove the requirement that persons convicted of bribery face permanent mandatory exclusion from future government contracts.²⁹¹ The UK updated its Code for Crown Prosecutors in January 2013 so that it no longer mentions mandatory exclusions from EU public procurement contracts.²⁹² Recommendation 6 called for the UK to implement easy access to a list of companies sanctioned for corruption charges, as the UK did not have a method in place of ensuring that exclusion from future government contracts was applied across the government.²⁹³ This recommendation is still under consideration by the UK National Anti-Corruption Plan.²⁹⁴

7.1.3 Canadian Law and Procedure

The 2011 Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada found that the *CFPOA* was lacking because it did not include civil or administrative debarment sanctions for companies convicted under the Act.²⁹⁵ The suggested sanction was exclusion from bidding on government contracts for a set period after conviction under the *CFPOA*.²⁹⁶ Canada's domestic bribery laws already provided for this:

Persons convicted under section 121 of the Criminal Code of bribing an official of the Government of Canada, government of a province, or Her Majesty in right of Canada or a province ("Frauds on the Government"), have no capacity to contract with Her Majesty or receive any benefit under a contract with Her Majesty, pursuant to subsection 750(3) of the Criminal Code, under Part XXIII, entitled "Sentencing."²⁹⁷

This provision applies only to charges of domestic bribery, and thus it does not capture *CFPOA* offences. However, the Working Group's follow up on Canada's sanctions for convictions under the *CFPOA* found that Canada had remedied this problem in July 2012,

²⁹¹ OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (2012), online:< <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>>.

²⁹² OECD, Working Group on Bribery, *United Kingdom: Follow-Up to the Phase 3 Report and Recommendations* (2014) at 11, online: <www.oecd.org/daf/anti-bribery/UnitedKingdomPhase3WrittenFollowUpEN.pdf>.

²⁹³ OECD, Working Group on Bribery, *Phase 3 Report [UK]*, (2012).

²⁹⁴ Sue Hawley, "Yawn and You'll Miss It: New EU Debarment Rules, Old Problems", *Corruption Watch* (4 March 2015), online: <www.cw-uk.org/2015/03/04/yawn-and-youll-miss-it-new-eu-debarment-rules-old-problems/>.

²⁹⁵ OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, (2011), online:< <https://www.oecd.org/canada/Canadaphase3reportEN.pdf>>.

²⁹⁶ *Ibid*, recommendation 2.

²⁹⁷ *Ibid* at 23.

when PWGSC added convictions for foreign bribery under s. 3 of the *CFPOA* to the list of offences that would automatically result in debarment.²⁹⁸ For more information on PWGSC's debarment policies, see Section 8.6 of Chapter 7.

7.2 Other Procurement Issues and Concerns

Procurement systems face the challenge of balancing the requirements placed on offering and bidding parties to ensure fairness and transparency with the size of the contract and the risk of corruption in the contract. Anti-corruption measures carry economic and intangible costs and procurement systems should strive to minimize those costs, as they are often borne by the public. The degree to which discretion should be regulated is another issue facing governments in designing procurement systems. Although unfettered discretion leaves space for corruption, some discretion is required in order to choose the best bid. As the projects being procured are often complex and encounter unforeseen issues, it is difficult to create a formula to calculate the full societal, environmental and economic cost of each proposal. Therefore, public officials must exercise some discretion in order to balance the costs and benefits of each project. Piga describes other problems associated with strict regulation of discretion:

Reducing discretion has other drawbacks that are seldom considered in the fight against corruption. First, rigid procedures may shield procurement officials/politicians from responsibility for poor performance and failures ("not my fault, the rules' fault), while favoritism may be hidden by a wall of complex procedural rules. Second, if the agent is competent, discretion offers valuable flexibility, especially in complex procurement situations.²⁹⁹

Instead of removing discretion to prevent corruption, holding officials accountable for defects in the procurement process is viewed as a more efficient way of reducing corruption.³⁰⁰

Public procurement projects also face the potential problem of inaccurate estimations of costs and benefits. First, public officials may promote and support "low-ball" estimates of projects in order to gain public support for the project. Subsequently, as the project evolves, those initial estimates may prove to be wildly low. Recent studies showcase the role that "delusion, deception, and corruption" play in explaining underperformance with regard to cost estimates and benefit delivery of major infrastructure projects.³⁰¹ Research done by Flyvbjerg

²⁹⁸ OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report and Recommendations* (2013) at 6–7, online: <www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>.

²⁹⁹ Gustavo Piga, "A Fighting Chance Against Corruption in Public Procurement?" in Rose-Ackerman & Søreide, eds, (2011), 141 at 152.

³⁰⁰ Ariane Lambert-Mogiliansky & Konstantin Sonin, "Collusive Market-Sharing and Corruption in Procurement" (2006) 15:4 *Journal of Economics and Management Strategy* 883 at 900.

³⁰¹ Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Rose-Ackerman & Søreide, eds, (2011), at 81.

and Molloy suggest that an important step in curbing corruption is focusing on accurate cost and benefits estimates at the planning and approval stage. They suggest that “planning fallacy,” a psychological phenomenon that influences planners and project promoters to “make decisions based on delusional optimism rather than on rational weighing of gains, losses, and probabilities,” contributes to the tendency of projects to run significantly over budget.³⁰² Planning fallacy, or “optimism bias,” may result in the incorrect tender being chosen, as it rewards individuals for exaggerating the benefits of their design and underestimating the cost of the project.³⁰³ Optimism bias can also be dangerous because when contracts are awarded for below their reasonable cost, contractors may cut corners by using inferior materials and compromising on quality in order to stay within the budget.³⁰⁴

Planners need to be aware of optimism bias in order to take steps to prevent it. Flyvbjerg and Molloy suggest that strategically implementing procedures to monitor and review forecasts can assist in reducing the prevalence of corruption and deception in public procurement.³⁰⁵ Their suggestions include developing financial, professional or criminal penalties for “consistent and unjustifiable biases in claims and estimates of costs, benefits, and risks.”³⁰⁶ The Treasury of the UK addressed this issue by denying access to funding for infrastructure project proposals that do not show that they have accounted for optimism bias in their planning.³⁰⁷

As stated above, corruption that occurs in the planning and project development stages is of particular concern. Corrupt politicians may choose projects that do not provide significant, or any, benefit to the public because they know that certain projects allow them to extract more bribes from contractors, or because they owe a contractor a favour. This kind of deliberate manipulation during project planning is likely to facilitate corrupt acts throughout the project lifecycle.³⁰⁸ As construction projects provide significant opportunity for corruption, countries may be infrastructure-heavy and yet have insufficient capacity to maintain and use the infrastructure. For example, a country may build hospitals that it cannot afford to staff or supply. As noted by the consulting firm Mott MacDonald, once a public need is found and officials determine that public funds will be allocated to meet this need, care must be taken in setting the parameters and budget for the project:

³⁰² *Ibid* at 88.

³⁰³ *Ibid* at 99.

³⁰⁴ Wells (March 2015).

³⁰⁵ Bent Flyvbjerg & Eamonn Molloy, “Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures” in Rose-Ackerman & Søreide, eds, (2011), at 104.

³⁰⁶ *Ibid*.

³⁰⁷ Mott MacDonald, *Review of Large Public Procurement in the UK*, study commissioned by Her Majesty’s Treasury (London: HM Treasury, 2002), online:

www.parliament.vic.gov.au/images/stories/committees/paec/2010-11_Budget_Estimates/Extra_bits/Mott_McDonald_Flyvbjerg_Blake_Dawson_Waldron_studies.pdf.

³⁰⁸ *Ibid* at 2.

During the project preparation period, significant opportunities arise for the diversion of public resources to favour political or private interests. This stage of the project cycle is when some of the worst forms of grand corruption and state capture occur. But this is not all. Failures in project preparation (whether due to corruption, negligence, or capacity constraints) can also open up opportunities for corruption at later stages of the project cycle. For example, inadequate project preparation may lead to subsequent implementation delays that may require changes that can be manipulated to benefit individuals or companies. The preparation stage is especially likely to facilitate corrupt acts at a later stage when failures at this stage are deliberate.³⁰⁹

It is important to screen out projects with high costs and grossly negative rates of return as early as possible, as this is the most serious consequence of inadequate project screening.³¹⁰ Governments spend a significant amount of money on consulting during appraisal and planning of the project, and thus should ensure projects are feasible and valuable to the public prior to expending public funds for consulting.³¹¹

³⁰⁹ *Ibid.*

³¹⁰ *Ibid* at 9.

³¹¹ *Ibid.*